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IN THE

Supreme Court of the United States

October Term, 1972

No. 72- 72-467

AUBREY KAUFMAN,

Petitioner,

against

DIVERSIFIED INDUSTRIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 72-

AUBREY KAUFMAN,

Petitioner,

against

DIVERSIFIED INDUSTRIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Aubrey Kaufman, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit entered in these proceedings on May 22, 1972.

Opinions Below

The Opinion of the Court of Appeals, not yet reported, is reproduced as Appendix "A" hereto, pp. 1a-14a, *infra.*

The Opinion of the District Court for the Southern District of New York is unreported, and is reproduced as Appendix "B" hereto, pp. 15a-34a, *infra.*

Jurisdiction

The Opinion and Judgment of the Court of Appeals was entered on May 22, 1972. A timely petition for rehearing and *en banc* request was denied on June 22, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether in a breach of contract action to recover damages resulting from the depreciation in value of shares of stock which occurred between the date of promised delivery and the date of actual delivery, the injured party, as a prerequisite to recovery, must prove that he intended to sell the stock prior to such depreciation?

Statement of the Case

Prior to May 9, 1968, the petitioner Aubrey Kaufman ("petitioner" or "Kaufman") was the owner of 17½% of the outstanding stock of Datatron Processing, Inc. ("Datatron"). On that date, he (and the five other shareholders of Datatron) entered into a contract with the respondent Diversified Industries, Inc. ("respondent" or "Diversified"), a public company whose shares were traded on the American Stock Exchange (68-84).* Under the contract, which specified that it was to be "governed, interpreted and construed according to the laws of the State of New York" (83), respondent acquired all of the outstanding shares of Datatron, in exchange for which respondent agreed to deliver two blocks of Diversified stock on two separate occasions. Petitioner received the first block. Respondent's obligation to deliver the second block was contingent on the earnings performance of Datatron for a specified period of time. The parties stipulated below that the performance of Datatron was in fact such

* Numbers in parenthesis refer to pages of the Joint Appendix utilized by both parties in the Court of Appeals. Numbers followed by the letter "a" refer to pages in the Appendix to this Petition.

as to obligate respondent to deliver to petitioner shares of Diversified stock having a "market value" of $486,377.50 (58) and that the number of shares to be delivered was to be determined in accordance with a formula specified in the contract. Under the relevant terms, the delivery to petitioner had to take place within 30 days after respondent's receipt of a certain financial statement, agreed to by Datatron's former shareholders, showing that Datatron's earnings were above a sum fixed by the contract. Respondent admitted below that it received such a statement on May 5, 1969 (58), so that the latest date it was obligated to deliver the stock to petitioner was therefore 30 days later, namely, June 4, 1969 (6a, 29a).

Under the contract, the shares of Diversified stock deliverable to petitioner were deemed to have a then market value per share equal to the average closing price per share on the American Stock Exchange for "the twenty day period next preceding delivery of the shares" (74). Accordingly, respondent was obliged to deliver 14,739 shares to petitioner by June 4 (359).* For reasons not here relevant, respondent failed to deliver any stock to petitioner until August 1, some two months after the date fixed by the contract, by which time the market price per share of Diversified stock on the stock exchange had declined from $33 to $21.63 (344), a drop of approximately one-third. Moreover, respondent delivered only 13,170 shares instead of the 14,739 required by the contract (59). Accordingly, the stock, when actually delivered, had a total value of $284,867.10 (based on stock market quotations), which was $201,510.40 less than the $486,377.50 in total value which petitioner was entitled to receive.

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* The number of shares was calculated as follows: Respondent had to deliver shares having a total value of $486,377.50. The average price of Diversified (Common) stock for the twenty day period prior to June 4 was $33 per share (344). Dividing the total value by the price per share yields 14,739.

After a jury trial on the issue of estoppel resulted in a verdict favorable to petitioner, the District Court held that respondent was liable for breach of contract because of its failure to deliver the 14,739 shares of stock to petitioner by June 4, 1969 (16a-18a). The Court further held that the date of promised delivery, *i.e.*, June 4, determined the date from which damages were to be measured and reasoned that the amount of petitioner's damages, in order to put him in as good a position as he would have been had respondent performed the contract, was the value of the stock to which he was entitled on June 4, less the value of the stock which he received on August 1 (29a-30a). However, the District Court found that since under the terms of the contract (paragraph 11 [79-82]) the stock to be delivered was not registered under the Securities Act of 1933 and its saleability was restricted by the contract, it had a market value which was 50% of the value of unrestricted stock (18a-19a; 30a). The Court's finding as to the discounted value was based on an evaluation of the expert testimony of witnesses produced by both sides (18a-19a), who testified that there was in fact a market for the unregistered shares which petitioner was to receive, but that the shares had a value of approximately 50% of the market price of registered shares which were traded on the stock exchange. The Court therefore computed petitioner's damages to be $100,750.95 (19a).*

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* The Court arrived at this figure in the following manner:

"I. Agreement under contract; shares of Diversified to be delivered on June 4, 1969—14,739 shares

Market price per share on June 4, 1969	$ 33.00	
Discount of 50% per share ..	$ 16.50	
14,739 shares x $16.50 equals	$243,193.50	
Loss to plaintiff on June 4, 1969		$243,193.50

On appeal, the Second Circuit agreed with the District Court that respondent had breached its contract with petitioner and that petitioner should have received 14,739 shares on June 4 (5a-8a). However, the Court of Appeals disagreed with the District Court's allegedly "simplistic" computation of damages, finding that "[t]he basic error below was the failure to separate and analyze the two distinct elements of damage; the non-tender of 1,569 shares and the delayed tender of 13,170 shares" (9a). The Circuit Court held that petitioner was damaged solely because of the non-delivery of the 1,569 shares, in the amount of $25,888.50,* but was not damaged by the delayed delivery of the remaining 13,170 shares even though the market value of the stock had declined by one-third between the contract date and the actual delivery date. The Circuit Court thus reduced the damages awarded by the District Court by $74,871.45 (10a-13a), reasoning that "if we assume that [petitioner] would not have sold the shares in the interim [between the contract date of June 4 and the actual delivery date of August 1], then on August 1

II.	Subsequent partial delivery on August 1, 1969—13,170 shares		
	(Loss to plaintiff on June 4, 1969—carried forward)		$243,193.50
	Market price per share on August 1, 1969	$ 21.63	
	Discount of 50% per share	$ 10.815	
	13,170 shares x $10.815 equals	$142,433.55	
	Credit		$142,433.55
	Damages to plaintiff		$100,759.95"

(19a)

* The figure was arrived at by multiplying the 1,569 shares by $33 (the June 4 price), discounted by the 50% figure for restricted stock utilized by the District Court (10a).

he was as in as good a position as he would have been had he received the 13,170 shares on June 4" (10a).

Although the highly speculative question of whether petitioner would have disposed of his stock during this period was never raised in the pleadings, the detailed pretrial order (56-66), or at the trial itself, the Second Circuit went on to hold that petitioner had failed to meet a newly announced burden of proving that he would have sold the stock had he received it on time and before it depreciated in value (11a-12a).*

The Court acknowledged that no such burden is ordinarily imposed where there has been a delay in delivery of property (10a). Indeed, the Court cited the rule as enunciated in 11 Williston, Contracts § 1390 (1968), as follows: "The normal measure of damages . . . is the difference in value of the goods at the date contracted for and their value when delivered." However, the Circuit Court, without citation to any precedent, held that this rule is predicated on an assumption that the property involved would have been immediately resold if it had been delivered on time, and is not applicable where the delayed delivery is of securities, stating (10a-11a): "In dealing with securities . . . particularly those that are restricted, it cannot be assumed that resale would have followed in the normal course of events."

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* Despite the fact that the parties did not try any issue regarding intent to sell, the Court, in footnote 8 to its opinion (12a-13a), cited testimony from the record below which purportedly "points in the . . . direction" that petitioner did not intend to sell his stock. However, each of the references made by the Court is either unsupported by the record or is in direct conflict with the evidence given at the trial. To take the most important reference, the Court stated that "Kaufman made no attempt to dispose of 8,015 Diversified shares which he already owned". That statement is false, the only testimony being that petitioner sold 2,000 unregistered shares (out of the 8,015) to Diversified on April 29, 1969 (Trial on Damages, p. 27, Ex. G), approximately two months before the promised date of delivery of the shares in suit.

Reasons for Granting the Writ

The Circuit Court has totally misconstrued and misapplied fundamental principles of damages which, prior to the decision below, had been consistently followed by New York courts and by other Circuits. The Court below has imposed an unjust and unconscionable burden on innocent persons injured by the wrongful actions of others. A person seeking just and fair compensation for the wrong done to him must now prove what he would have done in the absence of such wrongdoing. More particularly, the Second Circuit has adopted the novel theory that where it is found that a person has breached a contract by delayinng delivery of stock in a public corporation, which stock demonstrably depreciated in value during the period of the delay, the injured party must prove that he would have sold the stock before it depreciated. It is highly illogical to impose such a burden when the injured party is effectively prevented from being in a position to even seek to make a such re-sale because of the wrongdoer's breach.

If this Court does not review and overturn the Second Circuit's decision, the unprecedented, unsound, and unfair rule will prevent innocent parties from recovering damages to which they are entitled. Thus, the basic reason why certiorari should be granted is to prevent such an ill-advised decision, handed down by a most respected and influential tribunal, from causing a radical departure from principles of damages which have heretofore been universally applied.

The Second Circuit's Decision is in Direct Conflict with Basic Principles of Damages which have been Consistently Applied by New York Courts and the Other Circuit Courts.

By ruling that petitioner had to prove his intent to resell the stock which had not been delivered to him (even though petitioner did not have dominion over the stock), the Second Circuit has thus adopted a position which is diametrically opposed to New York law, and indeed to basic common law principles which have been followed by both Federal and State courts throughout the country. The rule newly announced by the Court departs from the basic principle of indemnity which underlies the law of damages. That principle is enunciated in *New York Water Servicing Corp.* v. *City of New York,* 4 A.D. 2d 209, 163 N.Y.S. 2d 538 (1957):

> "In fixing damages the object generally is to compensate or to indemnify, that is, to put the plaintiff in as good a position as he would have been had the defendant abided by its agreement (Williston on Contracts rev. ed. Vol. V, Sec. 1138) . . . Gains prevented as well as losses sustained are proper elements of damage. There is no rule of thumb to be applied to any given set of facts. We must look to the nature of the contract and the circumstances surrounding its breach."

While the Circuit Court gave lip service to this principle (9a-10a), the new rule which it has engrafted onto the law of damages departs from two universally applied principles which are designed to effectuate the indemnity principle. They are that (1) damages are to be measured as of the date of the breach and (2) any assumption that must be made should be that which is most favorable to the party who has been wronged. The Circuit Court refused to measure damages as of the date of promised delivery (the date of the breach), holding that "*if we*

assume that [plaintiff] would not have sold the shares" (10a) prior to August 4, the date of actual delivery, he was then not damaged in any way. Such an assumption clearly favors the party who has breached the contract.

These two principles from which the Circuit Court has departed have been firmly entrenched in both the statutory and decisional law of New York. In *Agostino* v. *State*, 255 App. Div. 264, 266, 5 N.Y.S. 2d 732 (1938), the Court set forth the first of these principles:

> "It has been stated as a general rule that whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him, and that a just indemnity can never be less than (although it may sometimes be more) than the specified amount of money, or the value of the property or service *at the time it should have been paid or rendered.*" (Emphasis supplied.)

The rule set forth in *Agostino* has been followed in New York cases involving breaches of contracts to deliver stock. See, for example, *Wildes* v. *Robinson*, 50 App. Div. 192, 63 N.Y. Supp. 811 (1900) and *Sloane* v. *McKane*, 131 App. Div. 244, 115 N.Y. Supp. 648 (1909), wherein it was held that damages are to be measured at the time of the breach. While the District Court followed this basic rule in calculating petitioner's damages, the Second Circuit completely ignored it, and its ramifications, in refusing to allow petitioner damages for the late delivery of stock which he had previously paid for. The critical fact which had to be proved in both *Wildes* and *Sloane, supra*, is the market value at the time of breach, not what the party deprived of his stock would have done with it once he obtained it. See also *Rosen* v. *Duggan's Distillers Product Corp.*, 23 A.D. 2d 635, 256 N.Y.S. 2d 950 (1965).

Similarly, the principle requiring the measurement of damages as of the date of the breach has been applied so as

to limit recovery. In *Simon* v. *Electrospace Corp.*, 28 N.Y. 2d 136, 269 N.E. 2d 21, 320 NYS 2d 225 (1971), New York's highest court applied the foregoing measure of damages to a situation where a plaintiff broker had been injured by the defendant company's breach of a contract to deliver stock, the court holding that in computing plaintiff's damages it was erroneous to credit him with the value of a dividend on shares of stock he never owned but would have owned if defendant had performed its contractual obligations and plaintiff had *not* sold his shares. This holding is in direct contrast with the Second Circuit's requirement that as a prerequisite to recovering damages the petitioner had to show that he intended to resell stock which he did not have. Such a practice of measuring a party's damage by highly conjectural conditions subsequent was thus condemned in *Simon*.*

The Second Circuit rule would have the detrimental effect of discouraging persons from accepting late delivery of depreciated property, since by such acceptance they would be penalized by not being able to recover the loss caused by the depreciation. The rule would thus tend to proliferate litigation.**

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* The Circuit Court did acknowledge and indeed applied the rule requiring the measurement of damages as of the date of the breach, with respect to the 1,569 shares which were never delivered. The court awarded $25,888.50 for failure to deliver those shares, basing the damages on the value of those shares as of June 4, the date of promised delivery. The Court did not require a showing that plaintiff intended to sell those shares before they depreciated in value. Its decision is thus internally inconsistent.

** The Circuit Court, on patently erroneous reasoning, held that petitioner was not being penalized for accepting the late delivery of 13,170 shares, even though by having refused it, "he could have received their dollar value as of June 4, saddling respondent with the market drop" (12a). The court reasoned that with the damages of $217,305 which he would have received had he refused delivery (computed by applying the 50% discount for limited marketability) petitioner could have purchased only 10,047 shares on August 1 (when the price was $21.63 on the Exchange) which was fewer shares than

Petitioner's damages were deemed by the Second Circuit to be highly speculative because of his failure to have met the newly announced burden of showing intent to resell before the market dropped. However, in view of the Circuit Court's express acceptance of the District Court's finding that there was an available market for the shares even though they were not registered (8a, 19a), the damages were not conjectural. Both petitioner (and respondent) introduced proof as to the market value of respondent's stock on both key dates, viz., June 4 (the contract delivery date and the date of the breach) and August 1 (the actual delivery date). Petitioner did not have to show that he actually intended to sell the stock, merely that there was in fact a market for such stock. See *Buyer* v. *Mercury Tech. Cloth & Felt Corp.*, 301 N.Y. 74, 77, 92 N.E. 2d 896 (1950), where the New York State Court of Appeals, with reference to a defendant's breach of a contract to timely deliver goods, held that although the injured party must show the actual availability of a market, "the law does not require that he actually make the purchase." This issue was discussed at length in *In Re New York, N. H. & H. R. Co.*, 64 Supp. 487 (D. C. Conn. 1945). There, various persons holding stock as collateral for payment of notes of a bankrupt railroad were enjoined from selling the stock. The injunction was eventually lifted upon a finding that it was wrongfully obtained but by that time the stock had become worthless. The Court held:

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the 13,170 he actually accepted. That analysis is clearly illogical since the 10,047 purchased through the Exchange would have been registered and thus not subject to the discount, while the 13,170 he accepted were unregistered. The court thus erroneously concluded that petitioner was better off on August 1, having accepted 13,170 unregistered shares worth $142,433.55 (13,170 x 21.63 x 50%) than he would have been if he had 10,047 registered shares worth $217,305. This obvious error in the court's analysis is at the heart of its decision.

> "(I)t is clear that the injunction was the proximate cause of the loss to the pledgees of their jus disponendi. . . . They are entitled to compensation measured by what they could have realized, *without proof that they would have elected to liquidate if they had been free to do so.* . . . In cases of conversion generally the measure of damage is the value of the property converted; to recover that value *the owner is not required to show what disposition he would have made had the conversion not occurred.* 65 C. J. 131. And if the wrongful detention of a chattel causes the owner to lose a ready market, the damage is recoverable, A. L. I. Restatement, Torts Vol 4, Pg. 674, *without necessity for proof, I think, that the owner would have availed himself of that market but for the wrongful detention which prevented him.* . . . The underlying principle, I apprehend, is founded upon the recognition of the fact that one having unqualified title to property, and indeed one having a qualified title with power of sale, has *unfettered choice as to whether he will hold and enjoy the property or by sale obtain its equivalent in cash. When deprived of that right by a wrongful act, compensation dependent upon a perilous opportunity to show that he would have sold of his own volition is something less than full compensation.* . . . Indeed, often — perhaps generally — the intervention of a wrongful act is not foreseen and the victim has in readiness no conscious policy for his guidance through an unexpected situation. Notwithstanding, *he is entitled to be restored to a position in which his range of elective action is as broad as under his original right.*" (Emphasis added.)

The District Court below, with which the Circuit Court disagreed, adhered to these principles, stating:

> "Defendant's third defense is based on the proposition that any evaluation of the 13,170 shares of stock as of June 4, would be speculative for two reasons: (1) There is no way to accurately fix money damages on that date; (2) the court is making an unwarranted assumption that plaintiff would have sold the stock had he been in possession of it. *First,* this

> court has already ruled, and defendant in his brief against plaintiff's motion to include a remedy for specific performance, concurred, that the money value of the stock is readily ascertainable. *Second*, the theory of damages applied by the court does not assume that the plaintiff would have sold the stock; it merely values the loss caused by the breach by the amount which plaintiff would have received had defendant fully performed. Obviously, the choice of whether plaintiff would have sold or retained the stock would have been solely plaintiff's decision". (31a-32a).

The fact that it cannot be said with absolute certainty that petitioner would have availed himself of the market by selling his shares should not be a bar to recovery. See *Spitz* v. *Lesser*, 302 N.Y. 490, 492, 99 N.E. 2d 540 (1951), wherein the New York Court of Appeals, relying on a decision of this Court, held:

> "Since it is defendant's own wrong which has rendered it impossible for plaintiff to prove his damages with more certainty, he cannot complain of the alleged uncertainty. The reason for this has been well expressed by the Supreme Court of the United States in *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264-265, 66 S.Ct. 574, 580, 90 L. Ed. 652:
>
> > 'Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. * * *
> >
> > 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' "

A case squarely in point, dealing with damage caused by delay in the delivery of a commodity of fluctuating value,

is *Richard* v. *American Union Bank*, 253 N. Y. 166, 174, 170 N. E. 532 (1930). New York's highest court there held:

> "Damages for failure to perform a contract for the delivery of a commodity are measured by the value of performance at the stipulated time. Delayed performance of the contract may be less valuable than the performance as stipulated. Though a buyer of a commodity may accept delivery of the commodity after the stipulated date, he may still retain his right of action for damages caused by delay. Personal Property Law (Consol. Laws, c. 41) § 130. At least where the commodity is purchased for resale and has a fluctuating market value the damages suffered by delayed delivery of the commodity are measured by the difference between the market value at the stipulated time of delivery and the market value at the time of the delayed delivery." *

Further, under New York law it is clear that mere acceptance of delayed delivery does not bar a suit for damages due to delay and that the question of subsequent resale, if applicable at all, relates solely to mitigation of damages, not to whether a party has in fact suffered such damages. See, e.g., *Pastor* v. *B. Lindner & Bros.*, 233 App. Div. 396, 253 N. Y. Supp. 184 (1931). The critical test is whether a party can prove that he has been damaged due to the delay. *Losei Realty Corp.* v. *City of N. Y.*, 254 N. Y. 41, 50, 171 N. E. 899 (1930); *Pennell* v. *New Jersey*

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* The Second Circuit purported to distinguish *Richard* v. *American Union Bank*, *supra*, by pointing out that the New York Court expressly limited its decision to cases where the commodity "is purchased for resale". The New York Court, however, was not distinguishing between a purchase by an investor and one by a trader, as is suggested by the Second Circuit. Rather the New York Court was distinguishing between purchase for resale and purchase for use, in which latter case, the measure of damages would not be the decline in value but rather the "value of the use". See *Allen* v. *Fox*, 51 N. Y. 562 (1873). An investor as well as a trader "purchases for resale" rather than for use, and the *Richard* case is clearly applicable.

Brass Corp., 186 N. Y. Supp. 606 (App. Div. 1921); *Crocker-Wheeler Co.* v. *Varick Realty Co.*, 104 App. Div. 568, 88 N. Y. S. 412 (1904); *S & L Paving Corp.* v. *MacMurray Tractor Co.*, 61 Misc. 2d 90, 304 N. Y. S. 2d 652 (Sup. Ct. 1969). As the District Court found, because of the substantial drop in the market price between the contract date and the delivery date, the value of the stock delivered to petitioner depreciated by in excess of $100,000. Petitioner has therefore met the only applicable burden.

In an analogous situation involving the exchange of property, the Fourth Circuit, in *Southern Materials Co.* v. *Bryan Rock & Sand Co.*, 308 F. 2d 414 (1960), has taken a position contrary to the Second Circuit's, but in accordance with New York law. In this case the defendant bought land from plaintiff in exchange for gravel. It sought to evade damages for its failure to comply with its contractual obligations on the speculative ground that plaintiff *might* improperly have disposed of the gravel. The Fourth Circuit summarily rejected this contention as to future intent of the plaintiff in language which is highly relevant to the instant petition:

> "Under the settled rule the plaintiff is entitled to the market value of the undelivered material and the defendant is not relieved of the obligation to deliver because of the possibility that the plaintiff might make improvident use of the material rather than sell it at the market price."

A conflict between the Third Circuit and the Second Circuit is reflected in *Slaughter* v. *Philadelphia National Bank*, 290 F. Supp. 234 (E.D. Pa. 1968), *rev'd on other grounds* 417 F. 2d 21 (3rd Cir. 1968). In that case the defendant had possession of stock of a closely held corporation, which had been placed with it as collateral for a loan. The defendant was found to have wrongfully failed to deliver the stock back to plaintiff until a time when the stock had become worthless. The District Court awarded

damages "measured by the depreciation in the fair value of the property wrongfully held . . ." (290 F. Supp. at p. 237). Neither the District Court nor the Third Circuit held that plaintiff must have proven that he intended to sell the stock before it became worthless. Indeed, it was there found that *there was no market* for the stock, since the stock was closely held (the plaintiff being one of six stockholders), it was not listed on any exchange and there had "not been a sale of stock from which a fair market value could be determined" (290 F. Supp. at p. 237). Despite this, the court awarded damages measured by depreciation in value (evidence having been offered of its "intrinsic value") without any evidence that the plaintiff either intended or indeed that he would have been able to sell the stock. In the instant situation, the stock, albeit unregistered, was of a publicly held company whose shares were traded on the American Stock Exchange, and the court found, on ample evidence, that there was an available market for it at a 50% discount from the price of registered shares.

Accordingly, it is clear that the Second Circuit has departed from basic principles of contract law by assuming a fact most favorable to the party who breached the contract. It is patently erroneous to impose upon the innocent party the loss resulting from the decline in the market value of the stock between the promised date and the actual delivery date, based upon speculation as to what he would have done if he had the shares at the promised time. If the issue is to turn upon a point as speculative as that, the person who committed the breach should bear the burden of the speculation.

Moreover, respondent, in effect, had converted petitioner's shares by failing to deliver them when required under the contract. See Williston on Sales (1948 Ed.), Vol. 3, Sec. 594. The same principles referred to hereinabove have been consistently applied in cases involving the

conversion of commodities like stock which by their nature have a fluctuating value. In such instances, the damages awarded by the New York State courts are the market value of the stock on the day of conversion, or the market value within a reasonable time after learning of the conversion, whichever is higher. See *Hartford Acc. & Indem. Co.* v. *Walston & Co.*, 22 N.Y. 2d 672, 238 N.E. 2d 754, 291 NYS 2d 366 (1968); *Mayer* v. *Monzo*, 221 N.Y. 442, 117 N.E. 948 (1917); *Gelb* v. *Zimet Bros.*, 34 Misc. 2d 401, 228 N.Y.S. 2d 111 (Sup. Ct., 1962), *aff'd* 18 A.D. 2d 967, 237 N.Y.S. 2d 989 (1963), and cases cited in *Annot.*, 31 A.L.R. 3d 1286, 1323-1329 (1970). The same rule has been applied by various Circuit courts. See, for example, *Atkins* v. *Garrett*, 270 F. 939 (5th Cir. 1971); *Henry* v. *North American Ry. Const. Co.*, 158 F. 79 (8th Cir. 1907); *Fink* v. *Bedell*, 1 F. 2d 73 (3rd Cir. 1924); *Harris, Upham & Co.* v. *Bartlett*, 435 F. 2d 855 (10th Cir. 1971. In none of these cases was plaintiff held to have the burden of proving that he *would* have sold his stock on the applicable date used for measuring his damages. As the Court noted in *Wright* v. *Bank of the Metropolis*, 110 N.Y. 237, 248-49, 18 N.E. 79 (188), the New York rule pertaining to the measure of damages in conversion cases obviates the need for making unnecessary assumptions based on the injured party's supposed intent.

In direct conflict with the view enunciated by the Second Circuit, 89 C.J.S. Trover and Conversion, § 121 (1955) categorically states the rule as follows:

> "In order to recover the value of the property converted the owner is *not* required to show what disposition he would have made had the conversion not occurred; and if the wrongful detention of property causes the owner to lose a ready market, the damage is recoverable, *without* necessity for proof that the owner would have availed himself of that market but for the wrongful detention." (Emphasis added)

Finally, the New York courts have explicitly stated that the foregoing principles are equally applicable to cases involving conversion or cases involving breaches of contracts to deliver stock, where, as here, the injured party has already paid the consideration specified in the contract. See, for example, *Barnes* v. *Brown*, 130 N.Y. 372, 29 N.E. 760 (1872); *Barber* v. *Ellingwood*, 137 App. Div. 704, 122 N.Y.S. 369 (1910).*

Underlying the principles enunciated by the foregoing cases is the policy consideration that because of the inherently unstable nature of the commodities market it would be imposing a harsh burden on stockholders wrongfully deprived of their dominion over their shares to have to prove what they would have done with such shares at any given moment had they received them. Even if the petitioner were an investor (as distinguished from a trader), his decision to hold, like that of any stockholder, would not be irrevocable but rather was subject to constant re-evaluation in light of market conditions. The petitioner was here deprived of the opportunity to sell during a period when there was a dramatic drop in the stock, going from $33 a share to $21.50 a share, a drop of

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* The Second Circuit found the stock conversion cases to be inapplicable on the purported ground that contrary to the instant case, they involved situations where "the complaining party had unfettered control of stock, but his *jus disponendi* was destroyed by the wrongful act of another." See footnote 8, p. 13a, *infra*. If the Court meant that petitioner did not have "unfettered control" of his stock because it was unregistered, it has previously been pointed out that both parties presented proof, accepted by the District Court in a finding expressly approved by the Circuit Court, that an available market for such stock did in fact exist. The restrictions on saleability, caused by the stock's not having been registered, is reflected in the 50% discount. Petitioner's "*jus disponendi*" was destroyed by the wrongdoing of respondent as effectively as in the cited stock conversion cases. It is therefore patent that the principles enunciated in those cases are clearly applicable hereto.

more than one-third in the value of petitioner's 13,170 shares. Certainly this is compensable damage. The cases cited herein so hold.

Finally, the situation at bar is tantamount to a suit for damages for wrongful detention of property. Under Article 7 of the New York Civil Practice Law and Rules, where a suit is brought for the recovery of personal property which has been wrongfully detained (formerly known as a replevin action), it is specifically provided that damages may be awarded for "depreciation of a chattel" CPLR 7108(a). Indeed, as was held by the New York Court of Appeals in *Michalowski* v. *Ely*, 7 N.Y. 2d 71, 163 N.E. 2d 863, 195 N.Y.S. 2d 633, 635-36 (1959):

> "If the property depreciated in value . . . the plaintiff is entitled not only to such depreciation, but to the 'interest on the [property's] value, taken as it was before the depreciation' as well."

There is no requirement imposed in such cases or in the statute that plaintiff sustain a burden of proving that he had intended to sell the property before it depreciated. See also *McGreevy* v. *New York Cent. R. Co.*, 243 A.D. 264, 277 N.Y.S. 1 (1928).

It is thus apparent that the Second Circuit has refused to follow the long line of State and Federal precedents which specifically deal with damages arising from the wrongful failure to deliver property belonging to another, whether such conduct be labeled breach of contract, conversion, or wrongful detention. Instead, the Court, without reference to any precedential authority, has announced a new rule which imposes upon an innocent party the burden of proving what he would have done if he had not been denied his property, a burden which unwisely and unjustly incorporates a highly speculative, subjective and elusive standard into the law of damages. Indeed, such a rule has

been expressly rejected by every other court which has been confronted by the issue. Its application in this case has resulted in the denial of just compensation and will have an enormous impact on the law of damages.

CONCLUSION

For these various reasons, this Court should grant certiorari and review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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Appendix A

(Opinion of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 669—September Term, 1971.

(Argued May 3, 1972 Decided May 22, 1972.)

Docket No. 71-1859

AUBREY KAUFMAN,

Plaintiff-Appellee,

v.

DIVERSIFIED INDUSTRIES, INC.

Defendant-Appellant.

Before:

KAUFMAN, ANDERSON and MANSFIELD,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Richard H. Levet, *Judge*, awarding Kaufman $152,885.40 as damages for Diversified's breach of contract.

Affirmed in part, reversed in part and remanded.

Appendix A

ROBERT M. TRIEN, New York, N.Y. (Philip Handelman, New York, N.Y. and Halpin, Keogh & St. John, New York, N.Y., of counsel), *for Plaintiff- Appellee.*

LAWRENCE M. POWERS, New York, N.Y. (Steven E. Gross, New York, N.Y. and Powers & Gross, New York, N.Y., of counsel), *for Defendant-Appellant.*

KAUFMAN, *Circuit Judge:*

In the main, this appeal presents a narrow and highly technical question of contract damages. The law of damages, however, does not lend itself to easy application or simplistic formulations, as our discussion will reveal, and an exposition of the complexities in this difficult case does not make for light reading.

In May 1968, Aubrey Kaufman and the five other shareholders of Datatron Processing, Inc ("Datatron") sold their Datatron shares to Diversified Industries, Inc.[1] ("Diversified") in exchange for Diversified shares, some to be delivered immediately, some contingent on Datatron's future performance. Kaufman commenced this action in the Supreme Court, New York County (subsequently removed by Diversified to the District Court for the Southern District of New York because of diversity of citizenship), alleging that Diversified had breached its agreement to deliver conditional shares. Judge Levet determined as a matter of law that Diversified had breached the contract, and after the jury ruled in favor of Kaufman on Diversi-

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[1] Diversified Industries, Inc. was formerly (and at the time of the agreement here in question) known as Diversified Metals Corporation.

fied's estoppel defense,[2] the parties stipulated to try the damage issue before the court. The total damages calculated by Judge Levet were $152,885.40—$100,759.95 for the breach itself, $34,438.65 for reasonable costs of the litigation reimbursable under an indemnity provision of the contract and the remainder for prejudgment interest. Diversified contends on appeal that the court erred in directing a verdict on liability and, in any event, erred in computing damages. We affirm the directed verdict on liability, but reverse and remand on the issue of damages.

A statement of the facts leading to the breach will aid in clarifying our resolution of the issues. Kaufman owned 17½% of the shares of Datatron when, on May 9, 1968, he and the five other Datatron shareholders contracted to sell all of the stock in Datatron to Diversified solely in exchange for Diversified shares. Pursuant to the contract of sale, Diversified initially delivered 45,800 Diversified shares to the six Datatron stockholders, of which Kaufman received 8,015. The agreement also provided that the selling shareholders would receive an additional sum of Diversified shares contingent on and varying with the performance of Datatron for the year ending December 31, 1968. The crucial provisions, which determined at what date and in what manner the number of shares due as additional compensation were to be computed, are subdivisions ii and iii of section 3(c) which follow:

> (ii) If for the calendar year ended December 31, 1968, the business of the Company and its subsidiaries has Net Income After Taxes as set forth in

[2] Diversified does not here challenge the jury's adverse conclusion on its estoppel claim which was based on Kaufman's alleged acquiescence in the May 5 leter purporting to fix the number of shares due under the contract. The jury was justified in finding no detrimental reliance by Diversified, even if Kaufman's actions did amount to acquiescence. Diversified discusses the estoppel defense on appeal only in an attempt to substantiate its contention that the trial court took inconsistent positions at the trials on liability and damage.

section 3(b)(i) which is in excess of $125,000, the Stockholders shall be entitled to receive shares of Diversified Stock having a then market value equal to four times the amount of the Net Income After Taxes in excess of $125,000. For example, if Net Income After Taxes for the year ended December 31, 1968 is $200,000, the Stockholders shall receive four times $75,000, i.e. $300,000 in value of Diversified shares.

(iii) Diversified shall deliver additional shares payable hereunder within 30 days after receipt of the financial statement, together with written approval by Stockholders, from which it appears that the earnings of the Company and its subsidiaries were such as to require a payment of additional shares hereunder. The shares of Diversified Stock deliverable shall be deemed to have a then market value per share equal to the average closing price per share of Diversified Common Stock, on the Stock Exchange where it is traded, for the twenty day period next preceding delivery of the shares. The market value in shares payable shall be divided by the then market value per share of Diversified Stock for determining the number of shares deliverable to the Stockholders.

An independent accountant, Lybrand, Ross Bros. & Montgomery, made the initial determination of the net income attributable to Datatron, which was subsequently approved by the former Datatron shareholders on April 29, 1969. It was stipulated in a Pre-Trial Order that the former shareholders, pursuant to section 3(c)(ii), were "entitled to receive shares of Diversified stock having a market value of $2,779,300, plaintiff's pro-rata share thereof being the amount of $486,37.50."

In its May 5 letter (signed by George Moll, President), acknowledging receipt of the approved income statement, Diversified calculated the number of shares due the former Datatron shareholders purportedly under section 3(c)(iii),

by using the average market price per share for the twenty business days preceding May 5 ($36.93). The letter stated that "[i]nstructions will be entered to issue certificates in the following names and amounts: . . . Aubrey Kaufman—13,170."

The price of Diversified shares began dropping in May 1969. On June 4, thirty days after acknowledgment of the approved financial statement, the closing price as well as the twenty-day average price of Diversified was $33. As yet, no shares had been delivered to Kaufman. It was not until August 1, 1969, that Kaufman received 13,170 shares of Diversified stock, the amount determined in the May 5 letter. The twenty-day average price as of August 1 was $23.24, and the August 1 closing price was $21.63.

Kaufman signed a receipt for the 13,170 shares on August 1 and forwarded a registered letter to Moll, which read in full:

> I hereby acknowledge receipt of 13,170 shares of Diversified Metals Corporation Stock. However, it is my understanding that the per share value was to be computed on an average price per share twenty days preceding issuance of the shares.
>
> Please examine your records as I believe Diversified Metals Corporation is in error.

This lawsuit followed.[3]

I. Breach

The threshold question is whether, as a matter of law, Diversified breached its contractual obligations. There is no dispute that physical delivery of shares did not occur until August 1. Diversified contends that the May 5 letter

[3] Other grounds for recovery pleaded by Kaufman, including a prayer for rescission, were disposed of by the trial court. No appeal has been taken from these actions.

and other actions it took in preparation for physical delivery constituted "delivery" of shares for purposes of the agreement. Judge Levet, however, excluded evidence that Diversified took immediate steps to perform including evidence that it notified the New York Stock Exchange (with whom a listing was pending) that additional shares had been reserved for issuance to the former Datatron shareholders.

None of the excluded evidence, however, would have turned the issue of delivery into a jury question. Section 1-201 of the Uniform Commercial Code (McKinney 1964)[4], the general definitional section, defines delivery with respect to securities as "voluntary transfer of possession." More specifically, §8-313 (1)(a) provides that delivery occurs when a person acquires possession of a security. Although §8-313(1)(d), relied upon by Diversified, broadens delivery to include possession by a third person for the account of another, that is obviously not the case here. It was conceded that on May 5 there were insufficient authorized shares to pay Kaufman and the other Datatron sellers. It would be straining the meaning of "possession" to hold that possession passed where the shares allegedly possessed are not even in existence.

II. Damages

A. *Date for Valuation of Shares*

In directing a verdict on the issue of breach, Judge Levet found that the delivery of shares did not take place within thirty days of receipt of the approved financial statement. All now agree that delivery should have occurred on or before June 4, 1969.

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[4] Section 21 of the agreement stipulated that New York law is to govern.

Appendix A

Once the parties stipulated that the court could fix damages, the court's initial task was to fix the date to be used in valuing the shares. The number of shares to be delivered to Kaufman to fulfill the contractual requirement that their market value total $486,377.50 then could be calculated. The date opted for by Kaufman was August 1. A literal and superficial reading of the contract lends some support to this contention, since August 1 was the date of delivery. Under this theory, because the twenty-day average price as of August 1 was $23.24, Kaufman should have received 20,931 shares—7,761 more than he actually received. His damages would be the August 1 value of these shares. This interpretation, seemingly correct at first blush, cannot withstand scrutiny. If the price of Diversified shares had been rising, Diversified could have delayed delivery indefinitely, and, with each price increase, it would in theory owe Kaufman fewer shares.[5] The obvious expectation of the parties was that the price of Diversified shares would continue to increase, since the market price had risen so remarkably from the date the Diversified stock was issued to the public in 1966 until the May 9, 1968, contract date. The purpose of requiring delivery within thirty days of receipt of the approved financial statement was to prevent Diversified from benefiting by extended delay in performance. To give any meaning to the thirty-day limit the contract must be interpreted so that it specifies not only the date for latest

[5] Because share price was to be computed by using a twenty-day average price, such delay would be completed risk-free. If the market price were much higher on the twentieth day than on the first, Diversified could safely delay delivery. Even if the price dropped on the twenty-first day, the twenty-day average would rise because the lower first day price would be eliminated in making the computation. Thus by employing this method, Diversified would owe fewer shares, and could keep delaying and profiting until the market price fell to its first day level.

delivery within its terms, but also the date for computing the number of shares payable. Thus, whether or not any shares were actually delivered on June 4, the contract fixed the number of shares due Kaufman on that date. This is what Judge Levet concluded, and the parties have not disputed this finding on appeal. As the twenty-day average price on June 4 was $33, Kaufman should have received 14,739 shares.

B. *Calculation of Damages*

To calculate the monetary damages attributable to the breach, the court below first discounted the value of the Diversified shares because the shares contracted for were so-called "letter" stock. Such stock cannot be sold freely to the public and thus has limited marketability. In brief, although the shares to be delivered were to have a value of $486,377.50 as defined in the contract, the market value of the shares would actually be significantly less than the defined value. Thus, damages for total breach would be less than $486,377.50. *See* 25 C.J.S. "Damages" § 79(f): "Where . . . the contract is to pay specific property, the measure of damages is the value of the property at the time of the breach, and this is true although the parties to the contract for the purpose of determining the quantity to be delivered have placed a price on it." Judge Levet decided upon a discount of 50%.[6]

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[6] At a supplemental hearing, both parties presented expert testimony to guide the court in choosing the proper figure at which to discount the value of the unregistered shares. Kaufman's three witnesses stated that a proper discount would be 20 to 33⅓% of the American Stock Exchange price. Diversified's witnesses testified the discount should be 40-60%. The court's choice of a 50% figure is thus supported by evidence and is not clearly erroneous. Indeed, Kaufman, who would benefit from use of a smaller figure, does not contest that 50% figure.

The court then calculated damages merely by subtracting the value received, $142,433.55 (13,170 shares at the August 1 market price of $21.63 discounted by 50%), from the value of promised performance, $243,193.50 (14,739 shares at the June 4 market price of $33 discounted by 50%), and arrived at a figure of $100,759.95. This simplistic computation obscured the nature of damages suffered for it confused the number of shares due with the value of those shares. Using the trial court's analysis, we question what the damages would have been if the price of Diversified shares fortuitously had risen to $40 by August 1. The court's figure for the value of the promised performance—$243,193.50—would remain unchanged. The value of the consummated performance, i.e., the value of the shares received on August 1, however, would be 13,170 times $40 discounted by 50%, or $263,400. Under these circumstances, the court would have been compelled to conclude that Kaufman in fact benefited from the breach, a startling result indeed when we already have determined that Kaufman should have acquired 14,739 shares but only received 13,170. Certainly these missing shares must have had some value, and Kaufman should recover their value whether the price of the shares has increased or decreased. Otherwise, the computation of damages would undercut our conclusion that Diversified should not be allowed to benefit from indefinite delay.

The basic error below was the failure to separate and analyze the two distinct elements of damage: the non-tender of 1,569 shares and the delayed tender of 13,170 shares.

There can be no doubt that damage resulted from the non-tender of sufficient shares. Here we recognize the general principle of contract law that "[i]n determining the amount . . . of 'damages' to be awarded, the aim in view

is to put the injured party in as good a position as he would have had if performance had been rendered as promised." *Corbin, Contracts* § 992 (1964). Damages are thus the value of 1,569 shares on the date of breach, *i.e.*, 1,569 at $33 per share on June 4, discounted by 50%, or a total of $25,888.50.

Whether Kaufman suffered compensable damages as a result of the delayed tender is more problematical. Because he eventually received and accepted 13,170 shares on August 1, it is difficult to discern how the delay caused any damage, unless he would have sold the shares between June 4 and August 1. If we assume that he would not have sold the shares in the interim, then on August 1 he was in as good a position as he would have been if he had received the 13,170 shares on June 4. Reverting to Professor Corbin's formulation of the pertinent law of damages for breach of contract, we are of the view that no damages should have been awarded for delayed tender.

Kaufman, however, urges us to adopt a different rule in the case of a delayed performance. As stated by Williston:

> The normal measure of damages . . . is the difference in value of the goods at the date contracted for and their value when delivered.

11 *Williston, Contracts* §1390 (1968). We note first that Williston specifically qualifies his formulation by stating that only consequential and foreseeable damages can be recovered. *Id.* Damages caused by a decrease in price may well be foreseeable, but are not always the consequence of delayed performance unless it can be assumed the shares would have been sold. Furthermore, Williston explicitly refers to breaches by "sellers" and implicitly to sales of goods, with citations exclusively to article 2 of the Uniform Commercial Code which excludes securities from its

reach. This is crucial because merchants and traders, in the normal course of business, sell or otherwise dispose of commodities. The rule affording them recovery for the drop in price is merely a shortcut for applying the traditional rule of damages as stated by Corbin. In dealing with securities, however, particularly those that are restricted, it cannot be assumed that resale would have followed in the normal course of events.

Kaufman relies heavily on *Richard* v. *American Union Bank*, 253 N.Y. 166 (1930), but we do not find it to be helpful to his position. The facts in *Richard* disclose that he paid $72,500 to the defendant Bank in exchange for future delivery of two million Rumanian lei (the currency of that country). The Bank did not deliver the foreign currency until well after the stipulated date, by which time the two million lei had dropped substantially in value measured by American dollars. The New York Court of Appeals, affirming an order striking affirmative defenses of defendant, held that Richard could recover damages for the delay. The opinion, however, makes clear that the crucial factor in its holding was the indication in the pleadings that Richard intended to resell the lei:

> Delayed performance of the contract may be less valuable than the performance as stipulated. Though a buyer of a commodity may accept delivery of the commodity after the stipulated date, he may still retain his right of action for damages caused by delay. . . . *At least where the commodity is purchased for resale* and has a fluctuating market value the damages suffered by delayed delivery of the commodity are measured by the difference between the market value at the stipulated time of delivery and the market value at the time of the delayed delivery. (Emphasis added.)

Id. at 174.[7] The record in this case does not permit an inference that Kaufman would have sold the 13,170 shares had he received them on June 4. In fact, although Kaufman had the burden of proof on this issue, all the evidence points in the other direction.[8]

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[7] Moreover, the pleadings in *Richard* indicated that the Bank knew the price of lei was falling and deliberately delayed performance so that it could buy lei at the market after the price dropped, and then perform its contract with Richard with the depreciated currency. Here, of course, Diversified in no way profited from the delay. Its own stock—the "currency" envisioned in the contract—was no less costly to Diversified merely because its market value has dropped.

[8] For example, Kaufman made no attempt to dispose of 8,015 Diversified shares which he already owned. Nor did he sell the 13,170 shares when he received them, although the price continued to drop.

It might appear that we are penalizing Kaufman for having accepted the 13,170 shares, for it would seem that if he had refused them on August 1, he could have received their dollar value as of June 4, saddling Diversified with the market drop. Closer analysis, however, indicates this is not so. A court awarding damages would have valued the shares after a suitable discount for their limited marketability, just as Judge Levet did. Assuming Kaufman expected the company to continue performing well, he was in a better position with the 13,170 unregistered shares in his possession than with damages in lieu thereof. His damages on June 4 with respect to the shares would have been 13,170 times $33 discounted by 50%, or $217,305. Even at the August 1 price of $21.63, Kaufman could have purchased only 10,047 Diversified shares for $217,305—considerably fewer than were delivered by Diversified. Moreover, the value of unregistered shares would soon approach the open market price because the May 9, 1968 agreement provided that Diversified would use its best efforts to register all unsold shares of the former Datatron owners within three years. The undisputed evidence indicates Kaufman was desirous of maintaining a position in Diversified stock. This was particularly true on August 1, since

Appendix A

In light of our discussion, we conclude that Kaufman's damages should have been limited to $25,888.50 for the non-delivery of 1,569 shares.

III. Other Recovery

In addition to the damages occasioned by non-delivery, Kaufman is entitled under section 6 of the agreement to indemnification for "reasonable costs, legal and other expenses" incurred as a result of Diversified's breach. Since we have reduced the damage award significantly and legal fees depended on a contingent fee agreement which Judge Levet considered in making his award, it follows that

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August 12 had been set for a spin-off distribution of Datatron stock to shareholders of record of Diversified. Thus an award of damages for late delivery would simply present Kaufman with a windfall.

This is in sharp contrast to the cases Kaufman cites in which market drops were laid at the defendant's door even without demonstration that the plaintiff would have sold his shares in the interim. In *In re New York, N.H. & H.R. Co.*, 64 F. Supp. 487 (D. Conn. 1945), those holding stock as collateral were wrongfully enjoined from selling the shares. By the time the injunction was lifted, the stock had become worthless. The noteholders then sought treatment as secured creditors to the extent of the value of shares when the injunction was ordered. The court properly rejected the argument that the noteholders must show they would have sold the shares but for the injunction. After all, the wrongful act obtaining the injunction—precluded the noteholders from taking the very steps defendants insisted they must prove. Crucial to the recovery in *New York, N.H. & H.R. Co.*, then, was that the complaining party had unfettered control of stock, but his *jus disponendi* was destroyed by the wrongful act of another. This is also true of the stock conversion cases cited by Kaufman. *See e.g., Gelb* v. *Zimet*, 228 N.Y.S. 2d 111 (N.Y. Sup. Ct. 1962); *German* v. *Snedeker*, 257 App. Div. 596, *rearg. denied* 258 App. Div. 708, affd. 281 N.Y. 832 (1939); cases cited in 31 A.L.R. 3d 1923-29 (1970).

Judge Levet should reconsider damages under the indemnification clause.[9]

Finally, we agree that Kaufman is entitled to interest on the damage award pursuant to New York C.P.L.R. §5001, which upon remand will be adjusted in light of the reduced recovery.

We have examined the other arguments of the parties, but find them to be without merit.

Affirmed in part, reversed in part and remanded for further proceedings in accordance with this opinion.

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[9] The district judge should be mindful that allowable costs have increased because of this appeal and the further proceedings that will be required. Since costs on appeal would be recoverable under the indemnity clause of the contract, it would be a waste of time to take the circuitous route of awarding costs on appeal against Kaufman only to permit him to be indemnified for these costs by Diversified. Accordingly, we direct that the costs on appeal be taxed against Diversified.

Appendix B

(Opinion of the District Court)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civil 4594

AUBREY KAUFMAN,

Plaintiff,

against

DIVERSIFIED INDUSTRIES, INC.,

Defendant.

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LEVET, *D. J.*

This is an action brought by plaintiff Aubrey Kaufman against Diversified Industries, Inc. ("Diversified") for

damages resulting from a breach of contract to deliver stock.

A jury trial on the issue of liability commenced on April 26, 1971. The court ruled that the only defense available to the defendant was the defense of estoppel. The jury returned a verdict for plaintiff as to this issue, thus finding defendant liable for breach of contract.

Upon suggestion of the court and by agreement of counsel on May 3, 1971, the damage portion of the trial was conducted before the court. The trial was held on May 6 and 13, 1971 and a supplemental hearing was conducted on June 28, 1971. After the trial, plaintiff submitted a motion to amend the complaint to provide for damages by specific performance. This motion was denied on June 7, 1971.

Thus the issues remaining to be determined by this court are as follows: (1) the amount of damages; (2) the amount of prejudgment interest; (3) the amount of indemnity.

After hearing the testimony of the parties, examining the exhibits, the pleadings and the Proposed Findings of Fact and Conclusions of Law submitted by counsel, this court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiff at the commencement of this action was, and presently is, a resident of the State of New York. Defendant at the commencement of this action was, and presently is, a resident of the State of Delaware. The amount in controversy exceeds $10,000, exclusive of interests and costs. 28 USC § 1332(a)(c).

2. Defendant Diversified entered into a contract dated May 9, 1968 (Pl. Ex. 1) with plaintiff, Aubrey Kaufman, and five other stockholders of Datatron Processing Inc. ("Datatron"), a New York corporation, which contract

provided for the exchange of all the issued and outstanding capital stock of Datatron solely for shares of common stock of defendant Diversified (Pl. Ex. 1, p. 1, "Plan of Reorganization"). Plaintiff owned 17½% of the outstanding stock of Datatron (35 shares) prior to the agreement (Pl. Ex. 1, p. 1, ¶ 1(a)(3)).

3. Under the terms of paragraphs 3(c)(ii) and (iii) of the contract of May 9, 1968, plaintiff and other former stockholders of Datatron were entitled to receive shares of Diversified stock equal to four times the 1968 net income of Datatron (after taxes) in excess of $125,000 (Pl. Ex. 1, p. 7, ¶ 3(c)(ii)). In accordance with that agreement and the 1968 net income statement of Datatron, plaintiff and other former stockholders of Datatron were entitled to receive shares of Diversified having a market value of $2,779,300; plaintiff's pro-rata share thereof being $486,377.50 (Pretrial Order ¶ 6).

4. Under the terms of the contract of May 9, 1968 (Pl. Ex. 1, ¶ 3(c)(iii)), plaintiff was entitled to delivery of 14,739 shares of Diversified common stock on June 4, 1969. This number of shares is computed, pursuant to the contract, by dividing the amount owed to plaintiff ($486,377.50) by the average price of Diversified stock 20 days prior to June 4, 1969 ($33 per share).

5. The term "average closing price * * * for the twenty day period next preceding delivery" (Pl. Ex. 1, ¶ 3(c)(iii)) means the average of the closing prices of Diversified common stock on the American Stock Exchange for the twenty trading days prior to June 4, 1969, beginning May 6, 1969 and ending June 3, 1969 (Supplemental Hearing, Tr. 5, 6, 8, 9). The word "delivery" in the above-quoted phrase is interpreted to mean the day of promised delivery (i.e., June 4, 1969).

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6. The defendant did not deliver any shares of Diversified common stock to plaintiff on June 4, 1969, and thus clearly breached the contract of May 9, 1968.

7. On August 1, 1969, defendant delivered to plaintiff 13,170 shares of restricted Diversified common stock (PTO, ¶ 7).

8. On August 1, 1969, plaintiff wrote to defendant informing it that it had not delivered the required number of shares pursuant to the contract (Pl. Ex. 7).

9. The closing price of Diversified common stock traded on the American Stock Exchange for the dates indicated below are as follows:

June 4, 1969 .....$33.00 per share
August 1, 1969 .....$21.63 per share

The average price of Diversified common stock for the 20 days prior to June 4, 1969 was $33 per share (Supplemental hearing, Tr. 5, 6).

10. The contract provided that the consideration to plaintiff was the delivery of shares of Diversified common stock (Pl. Ex. 1, pp. 1, 7, ¶ 3(c)). However, the shares were not to be registered under the Securities Act of 1933 and were subject to other restrictions as more particularly provided in the contract, i.e., "letter stock" (Pl. Ex. 1, ¶ 11).

11. The court finds that on June 4, 1969 and on August 1, 1969 the value of the shares of Diversified common stock which were restricted by paragraph 11 of the contract of May 9, 1968 (Pl. Ex. 1) was 50% of the price of Diversified shares listed on the American Stock Exchange on those dates.*

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* Plaintiff's experts testified that the discount for the stock would be 20 to 33⅓% of the price on the American Stock Exchange (Supplemental Hearing, Tr. 66-67). Defendant's three experts testified that the proper discount was 40 to 60% of the market price (Supplemental Hearing, Tr. 12-13, 49-50).

> court has already ruled, and defendant in his brief against plaintiff's motion to include a remedy for specific performance, concurred, that the money value of the stock is readily ascertainable. *Second*, the theory of damages applied by the court does not assume that the plaintiff would have sold the stock; it merely values the loss caused by the breach by the amount which plaintiff would have received had defendant fully performed. Obviously, the choice of whether plaintiff would have sold or retained the stock would have been solely plaintiff's decision". (31a-32a).

The fact that it cannot be said with absolute certainty that petitioner would have availed himself of the market by selling his shares should not be a bar to recovery. See *Spitz* v. *Lesser*, 302 N.Y. 490, 492, 99 N.E. 2d 540 (1951), wherein the New York Court of Appeals, relying on a decision of this Court, held:

> "Since it is defendant's own wrong which has rendered it impossible for plaintiff to prove his damages with more certainty, he cannot complain of the alleged uncertainty. The reason for this has been well expressed by the Supreme Court of the United States in *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264-265, 66 S.Ct. 574, 580, 90 L. Ed. 652:
>
> > 'Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. * * *
> >
> > 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' "

A case squarely in point, dealing with damage caused by delay in the delivery of a commodity of fluctuating value,

is *Richard* v. *American Union Bank*, 253 N. Y. 166, 174, 170 N. E. 532 (1930). New York's highest court there held:

> "Damages for failure to perform a contract for the delivery of a commodity are measured by the value of performance at the stipulated time. Delayed performance of the contract may be less valuable than the performance as stipulated. Though a buyer of a commodity may accept delivery of the commodity after the stipulated date, he may still retain his right of action for damages caused by delay. Personal Property Law (Consol. Laws, c. 41) § 130. At least where the commodity is purchased for resale and has a fluctuating market value the damages suffered by delayed delivery of the commodity are measured by the difference between the market value at the stipulated time of delivery and the market value at the time of the delayed delivery." *

Further, under New York law it is clear that mere acceptance of delayed delivery does not bar a suit for damages due to delay and that the question of subsequent resale, if applicable at all, relates solely to mitigation of damages, not to whether a party has in fact suffered such damages. See, e.g., *Pastor* v. *B. Lindner & Bros.*, 233 App. Div. 396, 253 N. Y. Supp. 184 (1931). The critical test is whether a party can prove that he has been damaged due to the delay. *Losei Realty Corp.* v. *City of N. Y.*, 254 N. Y. 41, 50, 171 N. E. 899 (1930); *Pennell* v. *New Jersey*

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* The Second Circuit purported to distinguish *Richard* v. *American Union Bank*, *supra*, by pointing out that the New York Court expressly limited its decision to cases where the commodity "is purchased for resale". The New York Court, however, was not distinguishing between a purchase by an investor and one by a trader, as is suggested by the Second Circuit. Rather the New York Court was distinguishing between purchase for resale and purchase for use, in which latter case, the measure of damages would not be the decline in value but rather the "value of the use". See *Allen* v. *Fox*, 51 N. Y. 562 (1873). An investor as well as a trader "purchases for resale" rather than for use, and the *Richard* case is clearly applicable.

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12. Shareholders of Diversified common stock were entitled to one share of Datatron for each share of Diversified that they held on or prior to June 26, 1969 (PTO, ¶ (a)(9)). The market price of Diversified registered common stock on June 4, 1969 included the value of this spinoff (Supplemental Hearing, Tr. 51-52). Therefore, this court finds that plaintiff is not entitled to any additional compensation due to the Datatron spinoff.

13. Plaintiff is entitled to $100,759.95 plus interest and costs for defendant's breach of contract, computed as follows:

I. Agreement under contract; shares of Diversified to be delivered on June 4, 1969—14,739 shares

Market price per share on June 4, 1969	$ 33.00
Discount of 50% per share	$ 16.50
14,739 shares x $16.50 equals	$243,193.50
Loss to plaintiff on June 4, 1969	$243,193.50

II. Subsequent partial delivery on August 1, 1969—13,170 shares

(Loss to plaintiff on June 4, 1969—carried forward		$243,193.50
Market price per share on August 1, 1969	$ 21.63	
Discount of 50% per share	$ 10.815	
13,170 shares x $10.815 equals	$142,433.55	
Credit		$142,433.55
Damages to plaintiff		$100,759.95

Appendix B

INDEMNITY CLAIMS

14. Paragraph 6 of the contract between plantiff and defendant, dated May 9, 1968 (Ex. 1), is as follows:

> "6. INDEMNITY BY DIVERSIFIED. Diversified hereby agrees to indemnify and hold each of the Stockholders harmless for a period of 36 months from the Closing Date against and in respect of any and all losses, claims, liabilities, damages or deficiencies resulting from any misrepresentation, breach of warranty or other breach hereof or failure of compliance by Diversified under this Agreement or in any document furnished to the Stockholders hereunder, and any and all reasonable costs, legal or other expenses incident to the foregoing.
>
> "If any loss or other basis for indemnification by Diversified to the Stockholders hereunder shall result in any tax saving or other monetary benefit to the Stockholders, the amounts recoverable by the Stockholders hereunder shall be adjusted downward to reflect such benefit."

1. CLAIMS FOR ATTORNEYS' FEES AND EXPENSES

15. On or about September 9, 1969, plaintiff, Aubrey Kaufman, retained Halpin, Keogh & St. John, Esqs., attorneys, of New York City, to represent his claims against Diversified (which claims were the subject matter of this action) (Ex. 20). At that time Kaufman paid a retaining fee of $10,000 to said attorneys (Ex. 21) and in addition agreed to pay one-third of any sum or property received and also any necessary disbursements (Ex. 20).

16. Philip Handelman received a Bachelor's Degree at New York University, graduated from Harvard Law School in 1932, was admitted to the New York Bar in 1934,

Appendix B

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>
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16. Philip Handelman received a Bachelor's Degree at New York University, graduated from Harvard Law School in 1932, was admitted to the New York Bar in 1934,

became a member of the Bar of the District of Columbia, practiced extensively, specializing in litigation, is a member of the Bar of this Court and of various Bar Associations. He has also handled cases involving S.E.C. and allied matters (Tr. 288, 289). Robert M. Trien, who was associated with Mr. Handelman in this case, graduated from law school about 1960 (Tr. 307) and is paid a salary (Tr. 310).

17. During preparation for trial the attorneys for Kaufman conducted the depositions of the following persons:

Name	*Date*	*Pages*	*Hours*
Irwin Ross	January 15, 1970	155	4 hours 30 minutes
Irwin Ross	January 16, 1970	43	1 hour 20 minutes
Irwin Ross	April 14, 1970	144	4 hours 30 minutes
Irwin Ross	June 4, 1970	89	3 hours 30 minutes
James F. Cear	Aug. 6, 1970	66	2 hours 20 minutes

Attorneys for plaintiff also attended and represented Kaufman at a deposition of said plaintiff conducted by defense counsel, as follows:

Date	*Pages*	*Hours*
November 20, 1969....	103	3 hours
December 3, 1969....	197	4 hours 50 minutes

On November 20, 1969, Handelman, Trien and Kelly appeared; on December 3, 1969, Handelman and Trien. At times, Mr. Handelman conducted the examination; at other times, Daniel W. Kelly or Eugene J. Keogh; Robert M. Trien, an associate, was present at all times.

The total time expended in taking depositions was approximately 24 hours.

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18. I find that plaintiff's counsel, Philip Handelman and Robert M. Trien, attended at trial and hearings after trial as follows:

April 26, 1971—Jury impanelled and trial begun—6 hours

April 27, 1971—Trial before jury continued—6 hours

April 28, 1971—Trial before jury continued—5 hours

April 29, 1971—Trial before jury continued and concluded; motions heard—3 hours

April 30, 1971—Summations delivered—4 hours

May 3, 1971—Jury charged on liability and defense of estoppel; verdict for plaintiff—6 hours

The parties stipulated that the court determine damages and amount of indemnity and the trial proceeded before the court after discharge of the jury.

May 6, 1971—Trial before court; adjourned to May 13—5 hours

May 13, 1971—Non-jury trial continued and concluded—4 hours

June 15, 1971—Conference with counsel re damages —1 hour

June 28, 1971—Further hearing for additional testimony of expert witnesses—3 hours

The total time at trial was approximately 43 hours.

I have no means of estimating other time spent by plaintiff's attorneys on this matter since the attorneys kept no time records and submitted no evidence of time expended.

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19. Upon examination of the clerk's file [1] in this case I find that plaintiff's attorneys performed the following services:

A. Before Trial

Prepared the summons and complaint;

Received and examined defendant's answer and counterclaim;

Prepared reply to counterclaims contained in answer of defendant;

Prepared motion papers to compel one Irwin Ross, an officer of defendant, to appear for completion of his deposition, to produce certain documents, and for other relief (Ex. 26);

Prepared motion papers to compel defendant to permit inspection and copying of certain documents;

Prepared plaintiff's requests to charge; prepared plaintiff's supplemental requests to charge; examined defendant's requests to charge;

Prepared plaintiff's pretrial memorandum;

Prepared plaintiff's trial memorandum;

Prepared plaintiff's supplemental trial memorandum;

Prepared pretrial order.

B. After Trial

Prepared plaintiff's proposed findings of fact and conclusions of law;

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[1] The parties stipulated that the papers in the civil file would be deemed in evidence as to claims of plaintiff for attorney's fees (Tr. 283).

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Prepared memorandum of law in support of proposed findings of fact and conclusions of law;

Received and examined defendant's proposed findings of fact and conclusions of law;

Prepared post-trial supplemental memorandum;

Prepared plaintiff's supplemental memorandum of law on damages;

Prepared supplemental brief respecting indemnity;

Received and examined the following memoranda of defendant:

Pretrial memorandium;

Trial memorandum;

Brief on the issue of damages;

Supplemental memorandum of law #2;

Supplemental memorandium of law #3;

Brief on damage formulation of defendant.

20. The basic amount plaintiff will be entitled to as a result of the outcome of this action is $100,759.95 exclusive of interest, costs and indemnity.

21. The testimony as to the value of the legal services was as follows:

Estimate of Handelman (Tr. 306)	$100,000
Opinion of Kleinman (Tr. 327)	70,000 to 80,000

It is clear that neither estimate is appropriate in a matter which proved to involve $100,759.95 (Finding of Fact 20).

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Handelman's estimate of $200 per hour or $1,000 per day in court for his own time and $150 per hour for his associate Trien's time is excessive and is not supported by factual testimony or proof of any kind other than Handelman's own "ipse dixit." I find that for an attorney of Mr. Handelman's standing $100 is fair and reasonable and that for Mr. Trien an appropriate amount is no more than $50 per hour. See Oscar Gruss & Sons v. Lumbermen's Mutual Casualty Company, 65 Civil 33, opinion dated November 21, 1968, page 12 (S.D.N.Y.), aff'd 422 F. 2d 1278 (2nd Cir. 1970).

22. Computed on the above hourly basis (Finding of Fact 21), the amount for the depositions which would be allowable are basically as follows:

Handelman	—24 hours at $100	$ 2,400
Trien	—24 hours at $50	$ 1,200

And for trial:

Handelman	—43 hours at $100	$ 4,300
Trien	—43 hours at $50	$ 2,150

Total on hourly basis of $100/$50 on depositions and trial $10,050

The above computation for trial and depositions is merely a partial guide to the total amount to which plaintiff should be awarded as indemnity for attorneys' services.

23. In addition to the time spent at depositions in court, plaintiff is entitled to a fair and reasonable allowance for the time and services and result accomplished by the services performed in the office. No indication of time spent on these services is indicated by the file record (see Finding of Fact 19). Hence, I am unable to make any determination

as to the fair and reasonable fee based solely upon a time computation. Very little time was expended in attempted proof of the value of attorneys' services. Plaintiff's attorneys will have one task yet to complete, i.e., settlement and entry of judgment with taxation of costs. Upon the record submitted, I find that the fair and reasonable amount for all services of the attorneys for which defendant is liable is the sum of $33,585.

EXPENSES OF PLAINTIFF'S ATTORNEYS

24. Plaintiff has submitted a sketchy claim for disbursements of the attorneys in connection with the prosecution of this case. It is unsupported by details, bills of itemization. Counsel apparently relies solely upon the testimony of Philip Handelman, Esq. As recapitulated in a brief of plaintiff entitled, "Supplemental Brief Respecting Indemnity • • •," these were as follows:

"(a) Cost of airline transportation between New York and Florida, plaintiff having resided in Florida during the bulk of the year for health reasons (SM 10)	$1,314.00
Taxi fares to and from the airport (SM 16)	50.00
"(b) Disbursements incurred by counsel in prosecution of the claim, as follows:	
Transcripts of depositions and trial (SM 295)	1,049.20
Additional transcript re damages (389 pages)	622.40
Photostats, telephone and process service (SM 298)	198.66
Additional photostats (SM 297) ($14.99, $26.75)	41.56

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Toll calls (SM 297)	$ 19.01
Messenger service to defendant's attorney's office (SM 299)	3.65
Additional photostats (SM 299)	99.90

"(c) Professional witnesses:

Professor Seymour Kleinman (SM 301)	1,500.00
Mr. Joseph A. Walker (SM 301)	500.00"

The following of the above claims are disallowed:

Transportation to Florida	$1,314.00
Taxi fares to and from the airport	50.00

These two items related to the personal affairs of plaintiff. They have nothing to do with the prosecution of the cause of action, which was started by plaintiff in a State Court in New York and removed to the Southern District of New York. His choice of residing in Florida was his own, for which defendant should not be compelled to pay.

The following items are also disallowed because they are taxable in connection with the costs in the judgment to be entered herein:

Transcripts of depositions and trial ...	$1,049.20
Additional transcript re damages	622.40
Transcript of hearing of June 28	116.80
Process service, as part of the item of $198.66	

All of the said items may be taxed as above stated, provided appropriate proof is submitted to the clerk.

Toll calls are disallowed	$ 19.01

No details of these calls were submitted. Telephone calls as a part of the item of $198.66 are also disallowed. Calls to plaintiff in Florida are not chargeable. The item for

photostats, to wit, $41.56, $99.00 and part of the item of $198.66 are disallowed. No proof whatsoever of what papers were copied was submitted, no bills were submitted. It may be that upon satisfactory proof the cost of certain photostats may be taxed in the judgment.

Hence, the only miscellaneous disbursement left is messenger service, $3.65, which is allowed.

2. Expert Witnesses

25. Seymour Kleinman, an attorney, a member of the faculty of Columba Law School and Rutgers University Law School, testified for plaintiff as to (1) the value of certain Lettered Stock of defendant involved in this action, and as to (2) the value of the services of plaintiff's attorneys as a part of the indemnity expenses claimed by plaintiff against defendant (see Tr. 199-215, 311-360).

Joseph A. Walker, registered representative employed by Hardy & Company, investment broker, testified for plaintiff on the value of the stock concerned in this action.

Plaintiff seeks to be reimbursed as part of the indemnity claimed against defendant, the sum of $1,500 for expenses of Kleinman's testimony and $500 for the expense of Walker's testimony.

I find that plaintiff's claim for Kleinman's services is excessive and should be reduced to $600 and that the claim for Walker's services is also excessive and should be reduced to $250.

Hence, I find that plaintiff is entitled by way of indemnity to recover the following sums:

Messenger service	$ 3.65
Kleinman witness charges	600.00
Walker witness charges	250.00
Attorneys' fee	33,585.00
Total Indemnity	$34,438.65

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Discussion

I. Damages for Breach of Contract

Plaintiff and defendant entered into a contract for the purpose of defendant's acquisition of plaintiff's (and five other stockholders') shares of Datatron, a New York corporation. Plaintiff was to be compensated as follows: (1) By transfer of a fixed amount of shares of defendant Diversified's common stock; (2) By transfer of a number of additional shares based upon the profit that Datatron netted for 1968.

The trial on defendant's liability and the court's rulings in connection therewith have already established that the contract was breached on June 4, 1969. Defendant agrees and, indeed, has urged that date as controlling (see "Defendant's Brief on the Issues of Damages," p. 1).

The formula for determining the number of additional shares which plaintiff was entitled to is contained in paragraph 3(c) of the contract; it required the defendant to deliver the additional shares within thirty days of receipt of a financial statement evidencing Datatron's net profit for 1968. The same paragraph requires the number of such shares to be calculated by dividing the total amount owned to plaintiff (defined by paragraph 3(c)(ii) and stipulated by the parties to be $486,337.50) by the average price of Diversified common stock for the twenty day period prior to delivery. The term "delivery" is hereby interpreted to mean the promised day of delivery (June 4, 1969).

Defendant received plaintiff's financial statement on May 5, 1969. The contract required delivery within thirty days, i.e. June 4, 1969. The average market price of Diversified common stock on the American Stock Exchange for the twenty day period prior to June 4, 1969 was $33 per share. Dividing the total amount owned to plaintiff ($486,377.50) by that average price, the number of shares which defendant owned to plaintiff on June 4, 1969 was 14,739. Actually, no stock was delivered on said date.

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Plaintiff bargained for payment in the form of stock, not cash. Under the terms of the contract (paragraph 11) the stock to be delivered was restricted. The basic rule of contract damages is to put the plaintiff in as good a position as he would have been had the contract been fulfilled. This means that the damages are measured by the value of the performance required under the contract. The expert witnesses have established, and this court has found (Finding of Fact No. 12) that the value of the restricted ("letter") stock was only 50% of the market value of unrestricted common stock. Therefore, under the contract, all damages that plaintiff is entitled to receive as a result of the breach are measured by the discounted value of the restricted stock.

The date of promised delivery (June 4, 1969) determines the date from which damages are measured. Wildes v. Robinson, 50 App. Div. 192 (1900); Sloan v. McKane, 131 App. Div. 244 (1909). Therefore, the amount of plaintiff's damage is the value of the stock to which he was entitled on June 5, 1969 less the value of the stock which he received on August 1, 1969.

The market price of a share of Diversified common stock on the American Stock Exchange on June 4, 1969 was $33. This market price must be discounted by 50% in computing the value of the restricted stock. The number of shares to be delivered on June 4, 1969 (i.e., 14,739) at the discounted value of the stock on that day ($16.50) is $243,193.50. The number of shares delivered on August 1, 1969 (13,170) at the discounted value of the stock on that date ($10.81) is $142,433.55. Crediting defendant with the sum of $142,433.55, plaintiff's damage is $100,759.95.

Defendant has interposed certain allegedly partial and complete defenses to plaintiff's recovery.

The first claim is that plaintiff held equitable ownership of the 13,170 shares from the time that defendant notified plaintiff of its intention to deliver the shares (May 5, 1968) (Pl. Ex. 5). Thus, defendant contends with respect to these

shares that it fully performed its obligation on time. Notwithstanding the cases cited by defendant, which are distinguishable on the facts, Section 8-309 of the Uniform Commercial Code ("UCC") requires *actual* delivery of stock before title can pass. Therefore, plaintiff did not have ownership of the 13,170 shares until August 1, 1969. Nor can defendant take refuge in the fact that plaintiff assigned 5% of his interest in the undelivered shares prior to August 1, 1969, for this transfer was an assignment of a future right.

Defendant's second claim is that plaintiff was obligated, pursuant to UCC 2-607(3)(a) to notify defendant of its breach on June 4, 1969 and that his failure bars recovery. Section 2-607, however, is manifestly inapplicable since it requires a buyer (plaintiff) to notify a seller (defendant) of a breach after the buyer has *accepted delivery* of goods. Here, there was no stock delivered on the due date. Therefore, plaintiff was not obligated to notify defendant on June 4, 1969. On August 1, 1969, plaintiff accepted as partial performance, 13,170 shares but on the same day he notified defendant that its performance was insufficient (Pl. Ex. 7).

Defendant's third defense is based on the proposition that any evaluation of the 13,170 shares of stock as of June 4 would be speculative for two reasons: (1) There is no way to accurately fix money damages on that date; (2) The court is making an unwarranted assumption that plaintiff would have sold the stock had he been in possession of it. *First*, this court has already ruled, and defendant in his brief against plaintiff's motion to include a remedy for specific performance, concurred, that the money value of the stock is readily ascertainable. *Second*, the theory of damages applied by the court does not assume that the plaintiff would have sold the stock; it merely values the loss caused by the breach by the amount which

plaintiff would have received had defendant fully performed. Obviously, the choice of whether plaintiff would have sold or retained the stock would have been solely plaintiff's decision.

Defendant's final claim is that plaintiff was under an obligation to "mitigate" his damages by "going into" the market and purchasing Diversified common stock. While it is true that at one time a common law duty required an aggrieved buyer to purchase goods in lieu of undelivered goods, Parsons v. Sutton, 66 N.Y. 92 (1876), there is no longer such an obligation. UCC 2-712 provides that "covering" for undelivered goods is an optional remedy available to the buyer; "Failure of the buyer to effect cover within this section does not bar him from any other remedy." N.Y. Uniform Commercial Code, 2-712(3) (McKinney 1964). Therefore, at no time was plaintiff under any obligation to purchase additional shares of stock.

II. Plaintiff's Claim for Additional Compensation Re Datatron Spinoff

Plaintiff contends that he is entitled to additional recovery because defendant's breach precluded him from participation in the Datatron spinoff (Finding of Fact 12). Plaintiff is incorrect. As stated previously, the basis for the measurement of plaintiff's damages is the date when performance was required, June 4, 1969. The expert witnesses testified (Supplemental Hearing, Tr. 51-52) and the court has found (Finding of Fact 12) that the market price of Diversified on June 4, 1969 included and reflected the value of the Datatron spinoff. No separate recovery, then, is warranted.

III. Plaintiff's Claim for Interest on the Damages

Plaintiff asserts that he is entitled to interest for the breach of contract under Section 5001, New York Civil Practice Law & Rules. This court is in agreement with that

claim. Section 5001(a) states that interest on a sum awarded for breach of contract shall be awarded. Section 5001(b) states that the interest shall be computed from the date the cause of action existed. The cases which defendant cites in support of his position deal with situations in which the damages were not reasonably calculable. The ruling of this court has been and is that damages are reasonably calculable. Interest from June 4, 1969 to August 1, 1969 on $243,193.50 and interest on $100,759.95 from August 1, 1969 to the date of judgment is appropriate.

IV. INDEMNITY

As already specified (see Finding of Fact 21), only "reasonable costs, legal and other expenses" are reimburseable under the indemnity provision (Ex. 1, ¶ 8).

The fact that Kaufman, plaintiff herein, has entered into a retainer agreement to pay counsel fees, as above set forth, does not obligate defendant to pay plaintiff the same amount. Plaintiff is entitled only to a reasonable amount for such fees and this is a factual question, here for the court to determine.

As Surrogate Delehanty wrote in Matter of Campbell, 176 Misc. 543, 545 (Sur. Ct., N.Y. Co. 1941):

> "****The indemnitee may recognize and place a value upon his damage by way of his counsel fees thereby binding himself to his counsel but in that event he can secure reimbursement only to a reasonable amount—itself a question of fact to be tried when the indemnitor properly raises that question if asked to make good on his promise. (Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 218; White v. Maryland Casualty Co., 139 App. Div. 179, 185).****"

See also Houston and Texas Railway Co. v. Henry Oram, 49 Tex. 341, 346-347 (Sup. Ct. of Texas, 1878).

Appendix B

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this action and over the parties (28 USC § 1332(a)) and the law of New York governs the substantive rights of the parties to this dispute.

2. Defendant, Diversified, has breached the contract of May 9, 1968 (Ex. 1) by failing to deliver 14,739 shares of Diversified common stock on June 4, 1969.

3. Plaintiff's damages for the breach of the contract, as heretofore explained, is $100,759.95 plus interest and costs.

4. Plaintiff did not breach any obligation to "mitigate" his damages.

5. Plaintiff is entitled to interest as follows:

(a) From June 4, 1969 to August 1, 1969, interest on $243,193.50; and

(b) From August 1, 1969 to the date of judgment, interest on $100,759.95.

6. Plaintiff is entitled by way of indemnity to recover $34,438.65.

7. Plaintiff is entitled to judgment against defendant in the total sum of $135,198.60 plus interest as aforesaid and costs.

8. Defendant's counterclaims for monetary and injunctive relief regarding an alleged defamation of its business by plaintiff are hereby dismissed.

Settle judgment on notice pursuant hereto promptly.

Dated: New York, N.Y.
July 7, 1971.

RICHARD W. LEVET
United States District Judge

Order Denying Petition For Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

71-1859

AUBREY KAUFMAN,

Plaintiff-Appellee,

against

DIVERSIFIED INDUSTRIES, INC.,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellee.

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

Dated: June 22, 1972

/s/
.....
IRVING R. KAUFMAN

/s/
.....
ROBERT P. ANDERSON

/s/
.....
WALTER R. MANSFIELD

Order Denying Petition For Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

71-1859

AUBREY KAUFMAN,

Plaintiff-Appellee,

against

DIVERSIFIED INDUSTRIES, INC.,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the appellee and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

HENRY J. FRIENDLY, *Chief Judge*

June 22, 1972

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OCT 18 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-467

AUBREY KAUFMAN,

Petitioner,

against

DIVERSIFIED INDUSTRIES, INC.,

Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LAWRENCE M. POWERS
Counsel for Respondent
110 East 59th Street
New York, N. Y. 10022

October 16, 1972

POWERS AND GROSS
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-467

AUBREY KAUFMAN,

Petitioner,

against

DIVERSIFIED INDUSTRIES, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT

Question Presented

Whether in a breach of contract action, a plaintiff should receive anticipated profits from an assumed sale of unregistered "investment" shares which were delivered late, without proof of intent to sell, and with affirmative evidence of intent to retain the shares, ultimately delivered two months late.

Statement of Facts

The decision by the Second Circuit resulted from an appeal by Diversified Industries, Inc., the Respondent ("Diversified"), from a Judgment filed July 15, 1971 in favor of Aubrey Kaufman, the Petitioner ("Kaufman").

This was a dispute over the interpretation of a contract resulting in an action for breach, and the case was tried before a jury on the issue of liability. But the District Court ruled as a matter of law that the contract read as Kaufman contended. It restricted the jury's determination to the issue of estoppel, and the jury ruled in favor of Mr. Kaufman on such defense.

The case was then tried before the Court on the issue of damages, by stipulation of the parties. The District Court found damages of $100,759.95, but in so doing reversed its prior determination as to the meaning of the contract, holding that the contract read substantially as Diversified had contended on the issue of liability. The withdrawal of the issue of performance and breach from the jury, and the instructions on estoppel were the basis for Diversified seeking a new trial on appeal. In addition, the basis for fixing damages was in issue on the appeal.

The Court of Appeals upheld the District Court on the issue of liability, but reversed it on the computation of damages, reducing the damage award to $25,888.50. Diversified's essential argument was that Kaufman was improperly seeking the fruits of an unrealized speculation, and that his whole case for damages was essentially one of overreaching and afterthought. The Second Circuit unanimously agreed on the following facts placed before it.

This was an action arising under the law of New York, removed to the federal court on diversity of citizenship jurisdictional grounds, and New York law governs all the issues of the case.* Diversified, a listed corporation, entered into a contract dated May 9, 1968 with Kaufman and five other stockholders of Datatron Processing Inc.

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* For this reason alone, any alleged differences in results reached in other Circuits is irrelevant to this Petition, but as will be shown, there are no real differences in the Circuits on the issues herein.

("Datatron"), a New York corporation, operating in the data processing and mailing service field. The acquisition contract provided for the exchange of all of the issued and outstanding capital stock of Datatron solely for shares of common stock of Diversified. Kaufman owned 17½% of the outstanding shares of Datatron prior to the agreement and was to receive 17½% of the Diversified shares payable. The Diversified shares were payable to all six of Datatron's shareholders in an initial installment of 45,800 shares (approximately $1,250,000 in market value) as of May 9, 1968, and in a contingent installment thereafter, if Datatron's earnings increased in the year ending December 31, 1968. The first installment was paid at the closing of the agreement, and under the terms of the contract, Kaufman and other former stockholders of Datatron were entitled to receive shares of Diversified stock equal to four times the 1968 net income of Datatron (after taxes) in excess of $125,000. In accordance with that agreement and the 1968 net income statement of Datatron, Kaufman and other former stockholders of Datatron were entitled to receive shares of Diversified equal to a market value of $2,779,300. Kaufman's pro-rata share thereof was $486,377.50.

Under the contract (Sec. 3(c)(iii)) Diversified had to deliver shares payable within 30 days after receipt of the 1968 income statement of Datatron with written approval by the former Datatron shareholders. While Diversified had the income statement alone from and after April 3, 1969, receipt of such income statement with the shareholders' approval was acknowledged by Diversified on Monday, May 5, 1969. Thirty days later was June 4, 1969, which became the deadline date for delivery of the shares. Under the terms of the contract Kaufman was entitled to delivery on June 4 of 14,739 Diversified shares. This number of shares is computed by dividing the amount owed to Kaufman ($486,377.50) by the average price ($33 per share) of Diversified stock 20 (business) days prior to June 4, 1969, pursuant to the contract.

However, if Diversified delivered the shares owing to Kaufman earlier than June 4, that is, on May 5, 1969 as was contended by Diversified, then Kaufman was entitled to only 13,170 shares on such earlier delivery date. This number is computed, pursuant to the contract, by dividing the amount owed to Kaufman ($486,377.50) by the average price ($36.93 per share) of Diversified stock 20 days prior to May 5, 1969. Diversified contended that it made a good equitable and/or legal delivery of the required number of shares in accordance with the contract, by written confirmation on May 5, 1969, although the certificates for such shares were not delivered until several weeks later. The relevant clause of Section 3(c) of the contract states:

> "(iii) Diversified shall deliver additional shares payable hereunder within 30 days after receipt of the financial statement, together with written approval by Stockholders, from which it appears that the earnings of the Company and its subsidiaries were such as to require a payment of additional shares hereunder. The shares of Diversified Stock deliverable shall be deemed to have a then market value per share equal to the average closing price per share of Diversified Common Stock, on the Stock Exchange where it is traded, for the twenty day period next preceding delivery of the shares. The market value in shares payable shall be divided by the then market value per share of Diversified Stock for determining the number of shares deliverable to the Stockholders."

As held by both the District and Circuit Courts, the term "average closing price . . . for the twenty day period next preceding delivery" in the second sentence of the quoted clause, means the average of the closing prices of Diversified common stock on the American Stock Exchange for the twenty trading (i.e., business) days prior to the deadline date for delivery June 4, 1969, beginning May 6, and ending June 3, 1969. The word "delivery" in the quoted phrase

was interpreted to mean the day of promised delivery (i.e., June 4, 1969). This correct interpretation of the contract was not questioned by either party on the appeal, although Kaufman based his whole case for $230,000 in damages plus attorneys' fees of $100,000 on a contradictory interpretation of the clause which he made to the District Court throughout trial. The Second Circuit nevertheless analyzed such issue of interpretation carefully, and agreed with the reading of the contract which led Diversified to reject Kaufman's claims throughout.

Diversified also maintained that the quoted clause of the contract also permitted delivery *before* June 4, 1969, the day of latest promised delivery, by the words "deliver . . . within 30 days" in the first sentence. If such delivery was, as contended, made earlier than the deadline date of June 4, 1969, i.e., on Monday May 5, the average closing price for an earlier 20 day period, beginning April 7 and ending Friday, May 2, 1969, would have yielded the 13,170 shares which Diversified claimed was all of it owed Kaufman. Such shares were confirmed to him by letter dated May 5, 1969. This commitment was also acknowledged by Diversified in a listing application filed with the New York Stock Exchange on May 12, 1969.

Diversified did not make physical delivery of certificates for the shares on either May 5, or June 4, 1969. Diversified attempted to show that the certificates were not promptly furnished because it was running close to using up all of its authorized, but unissued, shares during this seven week period, as a result of other commitments to issue shares. Commitments had been made to service outstanding convertible debentures and acquisition contracts, and in pending negotiations to acquire other companies in exchange for shares, but a number of these commitments were modifiable. Diversified argued that it committed, i.e., equitably delivered, the shares on May 5, but because of these obligations it therafter delayed taking required steps

with the American Stock Exchange and its stock transfer agent to issue stock certificates to the former Datatron shareholders. They were not furnished to Kaufman (or the other former Datatron shareholders) until August 1, 1969, when certificates for a total of 75,258 shares, including Kaufman's 13,170, were delivered.

During this eleven week period from May 5, to August 1, 1969, Kaufman did not make any written or oral statement to Diversified concerning the delay in delivery of his share certificates. He joined in a transfer by gift of part of these shares to the Datatron accountant, witness Edelstein, on May 29, 1969. He was otherwise silent on the subject of his 13,170 committed shares and on any alleged right to receive additional shares. However, in June and July Kaufman did speak with former stockholders of Datatron on this subject, several of whom had continued as officers of Datatron. Late in July, 1969, Kaufman told Datatron officers that he believed the contract required that the number of shares had to be recomputed as of the date delivery of the certificates occurred. Kaufman said that he intended to bring suit for additional shares over the 13,170 committed, but that he would wait until "he got the stock in hand" before he took any action.* Kaufman's comments to witness Cear (president of Datatron) after July 21 were imputed to Diversified by the District Court, because Cear had become a director of Diversified on July 17, 1969. Cear did not, however, recall having related Kaufman's statements to Diversified.

On August 1, 1969, Kaufman accepted the certificates for 13,170 shares, acknowledging their receipt "as per agreement." But he also wrote a registered letter to Diversified stating his views directly for the first time, saying ". . . it is my understanding that the per share value was to be computed on an average price per share 20

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* 268a, Appendix in Circuit Court.

days preceding issuance of the shares . . . I believe Diversified . . . is in error." Kaufman steadfastly maintained such position that per share price should have been computed as of August 1, 1969, i.e., whenever delivery of the certificates actually occurred. Such position was maintained, and accepted by the District Court, until it entered judgment herein in his favor on an inconsistent theory, determining breach and computing per share price as of June 4, 1969, the "promised" delivery date.

On May 5, 1969 Diversified's market price was approximately $37 per share. The average price of Diversified common stock for the 20 trading days prior to the deadline date for delivery, June 4, 1969, had fallen to $33 per share. Between June 4, 1969 and August 1, 1969, the closing price of Diversified common stock on the American Stock Exchange fell from $33 per share to $21.63 per share.

The contract provided that the consideration to Kaufman was the delivery of shares of Diversified common stock. However, the shares were not registered under the Securities Act of 1933 and were subject to other restrictions, making them "letter stock." The District Court found after a lengthy hearing (without cross-appeal) that on June 4 and on August 1, 1969 (and *a fortiori* on May 5, 1969 as well), the value of the shares, as restricted by Section 11 of the contract, was 50% of the price of Diversified shares listed on the American Stock Exchange.

On these facts, Diversified denied the breach of contract claimed, and contended that it made a good equitable delivery of the correct number of shares, as of May 5, 1969. The District Court rejected the contention of no breach, excluding such issue from trial or determination by the jury, and denied a motion for a new trial. The Circuit Court affirmed that portion of the District Court's conclusions, and such issue is closed.

Diversified further contended that assuming, *arguendo*, it did breach the contract on June 4, 1969, Kaufman may

have thereby been entitled to 14,739 shares, but Kaufman was silent until August 1 and then accepted 13,170 shares. Diversified argued that Kaufman had not suffered any recoverable damages from the late delivery of such shares, having shown no intent or effort to liquidate them during the period. Thus, his only claim was for the value of the 1,569 restricted shares that were never delivered, and with the applicable discount for this "letter stock," Kaufman's actual damages were limited to $25,888.50. But the District Court awarded damages for the delay in delivery of the 13,170 shares, by giving credit to Diversified only for the reduced market value of such shares as of the August 1 date they were accepted. The amount of damages was the second major issue of the appeal. The Circuit Court reversed on this issue, and held that Kaufman failed to prove any right to damages beyond the conceded $25,888.50. His award of attorneys' fees under the contract, based on the magnitude of his recovery, was remanded for reconsideration by the District Court.

The calendar of events herein is summarized:

May 5, 1969—Sending of Diversified commitment letter to Kaufman and other former Datatron stockholders.

May 12, 1969—Commitment of May 5 acknowledged in Diversified filing with New York Stock Exchange.

May 14, 1969—Kaufman's receipt of a copy of May 5 letter from Diversified covering his 13,170 shares.

May 29, 1969—Kaufman joins in assignment of a portion of such shares.

June 4, 1969—Delivery date required by the contract and breach date for purposes of this action, as ultimately found below.

Entire prior period through July 31, 1969—Kaufman says nothing to Diversified as to any claim of breach.

July 21 to July 26, 1969—Kaufman speaks to Cear (a Diversified director as of July 17) and says he thinks he

will be entitled to more shares, because under the contract computation should be made as of the 20 days before delivery of the certificates. Kaufman says he will wait until he has the stock in hand before he takes any action. Cear does not recall reporting these statements to Diversified.

August 1, 1969—Kaufman receives the 13,170 shares certificates and signs a document which says: "This will acknowledge receipt . . . as per agreement."

August 1, 1969—Kaufman sends a registered letter stating: "I hereby acknowledge receipt of 13,170 shares of Diversified Metals Corporation stock. However, it is my understanding that the per share value was to be computed on an average price per share 20 days preceding issuance of the shares. Please examine your records as I believe Diversified Metals Corporation is in error."

September 24, 1969 –Kaufman sues for $230,000 in money damages plus $100,000 in attorneys' fees, based on his theory of the contract requiring an August 1 computation.

The foregoing calendar of relevant events is referred to at several places in the Argument.

Reasons for Denying the Writ

The decision of the Second Circuit is neither new law nor in conflict with other Circuits. It merely applies ancient principles of the law of contract damages to a set of facts which reflected monetary injury of no more than 10% of the plaintiff's exaggerated and unwarranted claims from breach of contract. The decision was based on undisputed facts and not novel principles of damages, and Certiorari is not required here to do substantial justice to Petitioner nor to restate any principles of law relied upon by the Second Circuit.

Petitioner's Damages Were Properly Limited to the Value of the 1,569 Shares of Unregistered Stock Which Were Not Delivered, i.e., $25,888.50

A. ***There Was No Proof Of Damages From The Alleged Breach.*** The District Court determined that Diversified breached the contract on June 4, 1969, but such determination represented the first time that Kaufman had been made the subject of a contract breach on June 4, 1969. The determination below (after testimony was closed on liability and on damages) was a retroactive application of the ruling principles of law to this contract. But until the appeal Kaufman never claimed or proved any damages for late delivery of his 13,170 shares. He failed in his burden of proof on damages, and the record below was absolutely barren on such point. No testimony was ever presented by Kaufman on his alleged damages for late delivery. There was no evidence, other than a conceded market drop, to support the District Court's finding of an actual "loss" to Kaufman as to the 13,170 shares. The evidence was directly contrary to such finding of damages, and the Circuit Court determined such was the case on a most complete record.

(i) *Waiver.* The calendar of events above shows that Diversified delivered certificates for the 13,170 shares on August 1, 1969. Having accepted specific performance to that extent, could Mr. Kaufman then complain of damages for delay in delivering the shares he received "as per agreement"? While as an abstract legal issue, it was concluded after trial that the breach occurred on June 4, 1969 with respect to damages, partial specific performance was tendered and delivery accepted by Kaufman on August 1, 1969. His only claim in pleadings and at trial two years later was that the computation of the number of shares was in error and that he was entitled to more shares. The District Court ultimately dismissed his claim for faulty computation, deeming it amended after trial to state a

claim for delayed delivery (without expressly so stating), but Kaufman himself did not make a delayed delivery claim until the appeal. On the appeal, he accepted what had seemed error to him below and urged damages solely from delayed delivery in order to hold on to his money judgment. Kaufman did not waive his right to 1,569 more shares as of June 4 which were never delivered and waiver is not urged as a complete defense to liability herein. But Kaufman accepted the partial remedy of specific performance on August 1, 1969 and cannot now claim damages as to the 13,170 shares he accepted.

See *Franck* v. *J. J. Sugarman-Rudolph Co.*, 251 p. 2d 949, 953 (S. Ct. Calif., 1952) and 5A *Corbin on Contracts* §1245, p. 577 on the settled principle that a claim for damages can be discharged by voluntary acceptance of a defective performance, provided there is evidence of assent to the partial performance. A person suffering from breach of contract may elect to accept, and a court may decree partial specific performance, to the extent of the vendor's ability to comply with the other terms of the agreement. *Feldman* v. *Lisansky*, 239 N.Y. 81 (1924); *Prilik* v. *Goodman*, 111 N.Y.S. 2d 916, 918 (S. Ct., Kings 1952); *Itzkowitz* v. *Fertitla*, 76 N.Y.S. 2d 156 (S. Ct., Kings, 1947). Partial specific performance is a well-recognized remedy in equity. *Warren* v. *Hoch*, 96 N.Y.S. 2d 832 (A.D. 2d, 1950); *Big State Barging Co.* v. *Calmes*, 138 F.Supp. 891 (E.D. La., 1956).

If Kaufman had a remedy in damages on June 4, 1969 and he accepted a partial specific performance on August 1, should a court two years later have upset that binding step taken by him? If he wished to protect his right to sue solely for money damages, he had his remedy. He should have refused the 13,170 share certificates and promptly sued for money damages. But instead, he accepted the partial specific performance, a block of unregistered shares, and even assigned a portion thereof. Should the District Court have undone that completed,

voluntary act, undertaken by Kaufman with complete knowledge of his rights?

> "Where a contract is broken in the course of performance, the injured party has a choice presented to him of continuing the contract or of refusing to go on . . . the plaintiff cannot thereafter elect to foreclose its mortgage for a default which apparently it chose to disregard as a ground for termination of the contract." *Emigrant Industrial Savings Bank* v. *Willow Builders,* 290 N.Y. 133, 144 (1943, Ch. J. Lehman).

A basic principle applies here: "Acceptance of benefits under the contract with knowledge of the wrong constitutes a waiver of the wrong." *New York Tel. Co.* v. *Jamestown Tel. Co.,* 282 N.Y. 298, 372 (1940). While New York law governs this case, the principles involved are fundamental to the law of every state, are neither new nor unique and do not reflect any division in the Circuits or between the several states.

(ii) *Speculative Gain.* The damages awarded by the District Court were pure speculation, and in spite of Kaufman's claim of "new law", should not be reinstated. Kaufman's contract said: "The shares of Diversified Stock being delivered pursuant to Section 1(b) hereof shall be acquired and held by the Stockholders for investment, and not with the intention of any transfer thereof, by sale, gift or otherwise." Such investment representation was necessary for compliance with the Securities Act of 1933 in the issuance of unregistered shares. Kaufman himself said late in July, 1969 that he would not take any action to enforce his alleged rights to shares or damages until he "got the stock in hand." In order to award damages for delay in delivery from June 4 to August 1, 1969, the District Court necessarily concluded that Kaufman changed his recited investment intention just one year after he

entered into the contract in 1968, and was in fact ready and willing to sell on June 4, 1969. There was no evidence of any such change of investment intention in the record and no basis to surmise it. "Where damages are deemed speculative, recovery will be denied on the basis of pre-Code principles which . . . continue in force." *2 Anderson on the Uniform Commercial Code*, p. 770; see *Plastic Products Corp.* v. *Filtrol Corp.*, 137 F. Supp. 401, 407 (N.D. Okla., 1955). See *Smith* v. *Bolles*, 132 U.S. 125 (1889) and *Estate Counseling Service* v. *Merrill, Lynch, Pierce, etc.*, 303 F.2d 527, 532 (10th Cir. 1962), denying recovery even in securities fraud and other intentional tort situations, for the fruits of an unrealized speculation.

There is no evidence of any attempt by Kaufman to sell the 13,170 shares or any of his other 6,015 unregistered Diversified shares during the relevant seven-week period (although he took definitive action to sell 2,000 shares just a few months before this dispute arose). The District Court correctly fixed a value as of breach date for 1,569 unregistered shares never delivered, but it erred in fixing a value for the possibility of sale of 13,170 other shares, without proof of any attempt or intent by Kaufman to liquidate this "letter stock." Normally the damages for delay in delivering property or wrongfully depriving someone of possession are interest on the value of the property for the number of days of deprivation. See *In re Jones Will*, 227 N.Y.S.2d 486 (A.D.2d, 1962). It was a Draconian result in the District Court to hold Diversified liable for the whole drop in value of Kaufman's shares during this seven weeks, with no showing of readiness, willingness or ability, i.e., a contract or at least an offer, to sell them at any specific figure. The District Court erroneously assumed a loss merely because the paper value of an undelivered commodity went down, but a loss recognizable at law does not automatically follow from such fact. Thus, the Circuit properly reversed, saying "It cannot be assumed that resale would have followed in the normal course of

events." Petition for Writ, Appendix A (hereinafter referred to as "Pet. App. A [or B]"), 11a.

In the famous case of *Western Union* v. *Hall,* 124 U.S. 479 (1888) the Supreme Court held that speculative damages for an assumed stock market transaction that did not occur, because a telegram was sent a day late, could not be awarded. Such principle negates awarding Kaufman $75,000 because he might have sold the 13,170 shares between June 4 and August 1, 1969 if he had the certificates. Under the erroneous District Court holding and his present Petition, Mr. Kaufman would do better than any other Datatron shareholders receiving unregistered stock in Diversified during a period of market drop. He would convert paper value to cash, and earn a substantial capital gain, without showing any intent, any effort or any contract to sell his 13,170 restricted shares. The anomaly of his position is highlighted by the fact that he still had the shares two years later during trial, and was still able to realize speculative gain thereon while he was claiming monetary damages for an assumed sale in June, 1969. Contrary to established damage principles in all our courts, Kaufman's position would thus have been improved by the breach of contract. See *Hughes Tool Co.* v. *United Artists Corp.,* 110 N.Y.S. 2d 383, 385 (A.D. 1st, 1952).

The Datatron stockholders further considered the incentive shares, payable for a one year earnings increase over $125,000 to be pure profit, after having sold their company outright for the first installment in shares. They themselves described the incentive shares as the "Come arrangement,"* i.e., hoped-for profit in a game of chance. Any realization of cash on these contingent shares in 1969 was profit to these shareholders, for income tax and any other purposes. Kaufman would also be assumed to have liquidated his shares on the very day he was to receive them, June 4, not any of the other 50-odd days until

* 74a, 113a, Appendix in Circuit Court.

August 1, when the market price was lower on nearly each succeeding day. Notwithstanding a contract that fixed per share values by an average over a 20-day testing period, he would be given the prescience, without proof, of having sold out when the market was at its highest, on the first day of the seven-week delay. *Baker* v. *Drake,* 53 N.Y. 211, 215, denied damages for similar "supernatural powers of prescience" back in 1873. In the *Western Union* case, at p. 484, the Supreme Court said, ". . . If the order had been promptly delivered on the day it was sent, and had been executed on that day, *it is not found that he would have resold the next day at the advance* nor that he would have resold at a profit at any subsequent day . . ." [emphasis supplied]. Kaufman's mere *chance* to sell and retain paper profits, is no more compensable than the lost chance to sell in *Western Union* v. *Hall, supra.*

The Circuit Court's comments in distinguishing *Richard* v. *American Union Bank,* 253 N.Y. 166 (1930) are a complete answer to Kaufman's reliance thereon in his Petition. See Pet. App. A, 11a, Circuit Court discussion. In essence, a currency trader's announced intention to resell Rumanian money in the *Richard* case is not the same as a private individual waiting for unregistered shares deliverable under an acquisition contract. Kaufman is different from the claimant in *Richard* because Kaufman did not state any intent to resell at the time of contracting or thereafter, even through partial delivery and prosecution of an action for two years, seeking damages on a totally different claim for faulty computation.*

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* *Spitz* v. *Lesser,* 302 N.Y. 490 (1951) relied on by Petitioner did not involve valuation of a fluctuating commodity with a ready market for resale. The *Spitz* case dealt with a minimum royalty contract for producing toys, where the defendant did not go into production, and the plaintiff's sole basis for showing damages were the prescribed minimum royalties in the contract. Since the minimum royalties in the contract were the only damages plain-

(footnote continued on following page)

The reason Mr. Kaufman never made a claim or proof of damages from delayed delivery, from 1969 until after he obtained the District Court judgment and sought to sustain it on appeal, is readily inferred—he knew he was not actually damaged. This was the motivation for his unsupportable theory of the contract, that computation was open-end until actual delivery of certificates, unsuccessfully urged upon his fellow stockholders Cear and Ingenito who refused to sue. Kaufman thought his recomputation thesis was his only basis for a dollar recovery herein, since he could not prove any actual damages. During the relevant seven weeks' delay, he had no contract to resell his shares and no intent to sell them. Kaufman had asked Diversified to buy back 2,000 shares from him (so it could avoid the expense of registering them under the 1933 Act for public sale) months before this dispute arose, and such transaction closed April 29, 1969, showing one method of selling if he desired it. He made no other effort or request to Diversified to buy his shares, nor to register them under the Securities Act of 1933 for sale to others in accordance with his three-year contractual registration rights. To the contrary, the record shows a motive and intent by Kaufman to retain all remaining shares *after* June 4, because the Datatron spin-off dividend, announced in June, was payable on a share-for-share basis only to stockholders of record existing as of August 12, 1969. This crucial fact was emphasized by the Circuit Court (Pet. App. A, 12a-13a, ftn. 8); "The undisputed evidence indicates Kaufman was desirous of maintaining a position in

(footnote continued from preceding page)

tiff could prove, the Court merely affirmed the principle that since some damage was evident, the difficulty in exact proof should not prevent a rough approximation thereof, and the minimum royalty could serve as such approximation of damages. In the instant case, the Second Circuit has held, in effect, that substantial damages to Kaufman which were proximately caused by Diversified's seven weeks' delay in delivering 13,170 shares were not automatically evident.

Diversified stock. . . . Thus, an award of damages for late delivery would simply present Kaufman with a windfall." The evidence, particularly in the anticipated spin-off of shares of Datatron to all Diversified stockholders on August 12, 1969 (on a share-for-share basis) gave Mr. Kaufman a strong motive for retaining the shares and not selling them during the relevant period. Datatron was a company Mr. Kaufman had started as an initial founder, it was going public on its own in August, 1969, and all the former stockholders were looking forward to a new opportunity for speculative gain in its separate trading in the market place. If there was any company Mr. Kaufman knew, it was Datatron, and if there was any block of shares he wished to hold for investment, it was the anticipated spin-off dividend of some 20,000 shares of Datatron stock. He could only obtain these dividend shares by holding on to his Diversified shares past August 12, the record date for determining shareholders entitled to the dividend. In fact, he held the Diversified shares through the trial in 1971, notwithstanding the right to sell them privately and to demand registration under the 1933 Act for public sale. The delay in delivery of certificates for seven weeks in 1969 was, at best, a breach without substantive injury and required the conclusion reached by the Circuit Court.

Petitioner's attempt to show some division in the Circuits on the applicable rule of damages herein falls short of the mark. *Slaughter* v. *Philadelphia National Bank,* 290 F. Supp. 234 (E.D. Pa. 1968), which was reversed at 417 F. 2d 21 (3rd Cir. 1968), is cited by Petitioner, but such decision involves only a question of valuing shares in a closely held corporation, where the defendant contended that the absence of a market, automatically precluded the claimant from proving any damage because of the inability to value the wrongfully retained shares. Such decision has no relevance to the instant case, where market value was a determined fact, and where Kaufman had the option to sell readily available to him, if he really wanted to

sell during the seven-week period. Petitioner further cited *Southern Materials Co.* v. *Bryan Rock & Sand Co.*, 308 F. 2d 414 (4th Cir. 1960), which does not involve the issue in the instant case, because the Court there stated that the evidence showed there had not been much change in the price of gravel between the date when it should have been delivered and the date of trial. The *Southern Materials* case did not involve a commodity of fluctuating value, and the language in the case relied upon by Petitioner, does not support the mechanical rule of damages which Kaufman advances. The decision merely rejects an offset to damages which might have resulted from delivery and storage expenses for the undelivered gravel, if incurred. The Fourth Circuit merely refused to recognize what the complainant might have spent or might have done, as a defense to damages. In the instant case, the Second Circuit held Kaufman accountable for what he did during a crucial period of market downturn—which was to retain his shares and to speak and act as if he had no other intention.

(iii) *Depreciating the Value of Specific Performance.* The District Court erroneously stated in support of a finding of loss without proof that "it merely values the loss caused by the breach by the amount which plaintiff would have received had defendant fully performed" (Pet. App. B, 31a). This statement which Petitioner now relies on as the proper principle herein, cannot, however, withstand further analysis, for "the amount . . . had defendant fully performed" was *not* an amount. It was a block of 13,170 unregistered shares. Elsewhere the District Court opinion rightly states that "Plaintiff bargained for payment in the form of stock, not cash" (Pet. App. B, 30a). The District Court fixed damages by taking the depreciated value on August 1, of specific performance on June 4. It erroneously mixed two different concepts. Specific performance could not after it occurred be given a money value; it had only a performance value. *In re Carter's Claim,* 134

Atl. 2d 908, 913 (S. Ct. Pa., 1957), states this principle:

> "If A promises to deliver B 1300 shares of A Co. stock but delivers only 1200 shares there is no injustice in allowing B to take the 1200 and sue for damages. But if A promises to deliver 1300 shares at a certain price, and B promises to pay a certain price for them, but the contract provides that B need not perform if the market is lower than the sale price on the delivery date, there is no basis in law or justice in allowing B to take the shares and sue for the difference between sale price and market price. This is precisely the situation before me, and nothing in the Sales Act, the Uniform Commercial Code, or any of the cases cited lead to a different result from that which I have reached."

The principle is stated in the context of comparing a warranty with a condition to closing an acquisition contract, but applies equally herein. If Kaufman had a right to an "amount" on June 4, and Diversified handed him bonds in that amount, or any other commodity, Kaufman did not have to accept it. The law gave him the right to money, once a breach was established, and he could have rejected unregistered shares. Payment of money became a condition to the closing out of his contract. Can he waive that condition by accepting a commodity on August 1, 1969, then unilaterally value the commodity at $75,000 less than it was worth seven weeks earlier? If the stock had gone up, could Diversified have satisfied its breach of contract by delivering fewer shares? Either approach would take a voluntary agreement of the parties, not an act by the District Court two years later, to revalue the commodity accepted. See the New York rule, which controls, in *Fiorito* v. *Yaskulski*, 228 N.Y.S. 2d 598 (A.D. 4th, 1962), holding that when specific performance is being decreed, the court cannot rewrite the parties' contract. The party in breach therein was directed by the lower court to pay in

cash at the closing, but the New York Appellate Division held that the contract entitled him to deliver a second mortgage and obtain a deferred pay-out, and that the decree of specific performance must be so revised. *Accord: Robert S. Smith Corp.* v. *Krausharr,* 292 N.Y.S. 410 (A.D. 2d 1936). Full credit is normally given for partial performance of a contract to deliver a specified number of a commodity. See *Consol, Mounting, etc.* v. *Robert Teller, etc.,* 170 N.Y.S. 2d 2, 4 (A.D. 1st 1957).

The Circuit Court was careful to point out (Pet. App. 12a, ftn. 8) that it was not, in any event, penalizing Kaufman for accepting the shares delivered late, since he could have bought no more than 10,047 registered shares with the amount of money receivable on his damage claim even at the low price on August 1, and instead received 13,170 shares by accepting partial performance. Kaufman's Petition (at p. 10, ftn. **) attacks this reasoning by saying the 13,170 unregistered shares accepted were still worth much less than 10,047 registered shares obtainable in the market on that date. Notwithstanding Kaufman's assertion that "this obvious error in the court's analysis is at the heart of its decision," the Circuit Court footnote (a long way from the heart of the decision) states that the value of 13,170 "unregistered shares would soon approach the open market price" because of Kaufman's 1968 contractual rights to registration under the 1933 Act. (Pet. App. A, 12a, ftn. 8). The heart of this footnote is the conclusion that Kaufman wanted to obtain and retain all the shares he could get, and was not interested in money damages on August 1, 1969.

The shifting and inconsistent positions of Petitioner on the damage issue may have accounted for the erroneous result in the District Court which the Circuit Court had to correct when it examined the bottom line of Kaufman's behavior—no sale and no intent to sell. The damage trial started after a District Court determination of breach, and a jury determination of no estoppel that occupied two

weeks of trial time. Kaufman then went forward to demand the market value of 7,767 additional shares as of August 1—$180,000 plus another $50,000 for the value of Datatron shares receivable in an announced spin-off distribution effective after August 1.* However, market value of the base claim on August 1 was only $165,000 and testimony was showing that unregistered shares were worth only 50% of such amount. Kaufman made no attempt to prove actual damages, relying solely on his contract theory, and trial time on the ultimate issue of the case was spent almost exclusively on the valuation of unregistered shares. Facing a recovery on a $230,000 claim reduced to $82,500, Kaufman sought to change his ground. He asked to amend his pleadings, after trial of the damage issue was virtually complete, to seek specific performance as of August 1, 1969, which would have yielded about $109,000 in commodity value, with the shares probably free under the 1933 Act because two years had gone by. The District Court properly refused to allow this belated shift from damages to specific performance. Then Petitioner made his next shift in position, arguing that June 4 was the breach date, and that his claim to 7,767 additional shares should be valued at the higher price ($33) on such earlier date; thus, even with a 50% discount for unregistered shares, he could still net $138,000. But as cases without substance often end up, he became entrapped in the logical implications of his new approach. A June 4 breach date required a computation of shares at this value on such date, yielding only 14,739 due, and Diversified was still entitled to full credit for the 13,170 shares delivered. The maximum recoverable damage on his $230,000 claim became only $25,888.50. At that point, Kaufman's counsel went back to his first position,

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* This manifestly improper $50,000 claim seeking payment twice for the same Datatron shares, whose future value was part of the parent company's stock value during the relevant period, was denied in Finding 12 by the District Court, without cross-appeal (Pet. App. B, 19a).

arguing for an August 1 breach date and seeking the value of 7,767 additional shares on such date. Diversified urged June 4 as breach date because, while it claimed full performance on May 5, the District Court had already rejected the contention of equitable delivery. Diversified's outside date for performance and the governing breach date, therefore, was June 4, 1969.

The District Court accepted the June 4 concept at that point, upsetting the whole logical superstructure of its findings on liability in the process, and correctly held that if there was a breach, it occurred on June 4 and shares deliverable had to be computed as of such date. But at that point weeks of judicial effort had elapsed on a claim that had all but evaporated, and Kaufman was still contending that computation had to be made as of August 1 because the contract clause 3(c) (iii) was "open-end." The District Court then, on its own motion, determined that Diversified should not get credit for delivering 13,170 out of 14,739 due, but only credit for the *depreciated cash value* of 13,170 shares on August 1. Finding 13 (Pet. App. B, 19a) thus gave a result to Mr. Kaufman neither prayed for nor proven, with interest and contractual attorney's fees based on the $100,759.95 windfall.

The concept of a depreciated value for specific performance applied by the District Court and resubmitted by Kaufman on his Petition herein is erroneous, and assumed a loss without any testimony as to actual damages, and in the face of definitive evidence of waiver and of no actual loss. By a June 4 breach date, full specific performance was 14,739 shares, and if Kaufman, in the words of the District Court "accepted as partial performance 13,170 shares" (Pet. App. B, 31a), the District Court should not have revalued them at an assumed cash equivalent. The shares were not given in lieu of cash at some agreed value; they were given and accepted as shares. This factual essence in the reversal of the District Court cannot be over-

looked in evaluating the result reached by a unanimous Court of Appeals.

Diversified advanced two other contentions requiring reversal which the Circuit Court did not apparently reach.* Kaufman's Petition re-opens these issues and the following sets forth two additional reasons why reversal of the District Court was required.

B. ***Kaufman had a Duty to, And Failed to, Mitigate Any Damages From Later Delivery.*** The undisputed facts (see timetable) showed that Kaufman took no steps from May 5, 1969 through August 1, 1969 to mitigate his money damages from delayed delivery of his share certificates, notwithstanding a steadily falling market in Diversified shares throughout such period, going down from $36.93 in May to $33 on June 4 and down to $21.63 per share on August 1, 1969. There is no dispute over the fact that Kaufman did not sell any shares, either outright or by short sales (delivering borrowed shares), to fix his price and resulting profit on the 13,170 Diversified shares committed to him. He also did not notify Diversified of his claim directly until August 1 (he notified a director, Cear, after July 21), so that Diversified could take steps to hedge in the open market or otherwise reduce the parties' damages by prompt delivery. Kaufman's failure to take any of the available steps to minimize his losses is an ultimate fact not in dispute. The sole issue is whether he had a duty to mitigate damages for the delay in delivery of his 13,170 shares. The Circuit Court did not need to reach this issue because of its conclusion that damages in this factual context required Kaufman to fulfill a burden of proof of intent to sell, but Petitioner's insistence on attempting to reinstate the erroneous District Court decision

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* The opinion, Pet. App. A. 14a, mentioned at the end "we have examined the other arguments of the parties, but find them to be without merit."

requires analysis of this third defect in its reasoning. Petitioner is now urging that a conversion rule of damages should be applied herein, i.e., damages for the highest value attained during a period of wrongful deprivation of property (Pet. App. 17). But this principle brings into application the settled limitation on such rule—the duty to mitigate damages within a reasonable time after knowledge of the wrongful appropriation.

The District Court dealt with the mitigation of damages issue in terms of the recognized common law duty that required an aggrieved buyer to purchase goods in lieu of undelivered goods, citing *Parsons* v. *Sutton*, 66 N.Y. 92 (1876). But then the District Court erroneously stated "there is no longer such an obligation," citing the U.C.C., Section 2-712(3) which gives the buyer of goods the optional remedy of "covering," but states that "Failure of the buyer to effect cover within this section does not bar him from any other remedy." New York U.C.C., Sec. 2-712(3), (McKinney's, 1964) (Pet. App. B, 32a). The error in this holding is twofold—Kaufman should have mitigated his claim to money damages by selling shares, not by buying more; "covering" by buying would merely worsen his position in a falling market.* More fundamentally the U.C.C. has not changed the traditional rule requiring a plaintiff to minimize losses on a claim for money damages (whether from breach of contract or conversion) by any reasonable means.

(i) *The Common Law Rule.* The rule of *Parsons* v. *Sutton, supra,* has been repeated in New York many times.

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* Covering was relevant only if Kaufman wanted the shares themselves—then his remedy was buying at a reduced price in the market and suing only for his actual cost, or alternatively, accepting the specific performance as to 13,170 shares (which he did, see Point (A)(i) "Waiver.") and suing for the balance of 1,569 shares or their money value on June 4, which the Circuit Court awarded to him.

See *DaBiere* v. *Von Goeben*, 171 N.Y.S. 2d 933 (A.D. 3rd, 1958). The duty to mitigate damages for breach of contracts of which the "cover" rule is a part, is well stated in *Hamilton* v. *McPherson*, 28 N.Y. 72 (1863) holding that the party subject to injury from breach has "the active duty to make reasonable exertions to render the injury as light as possible . . . and if the injured party through negligence or willfulness allows the damages to be unnecessarily enhanced, the increased loss justly falls on him. See also *Losei Realty Corp.* v. *City of New York*, 254 N.Y. 41, 48 (1930) cited by Petitioner himself. Minimizing damages can require prompt selling as well as buying, *Waumbek Manuufacturing Co., Inc.* v. *Alfandri*, 187 N.Y.S. 439 (A.D. 1st, 1921). The stock conversion cases mentioned in *Gelb* v. *Zimet Brothers, Inc.*, 228 N.Y.S. 2d 111 (St. Ct., N.Y. 1962), also cited by Kaufman, required him to fix the price on his 13,170 fluctuating shares by sale in the open market on or before June 4, 1969.* In *Wright* v. *Bank of Metropolis*, 110 N.Y. 237, 246 (1888) cited by Petitioner, the New York Court of Appeals said:

> "This duty, it seems to me, is founded upon the general duty which one owes to another, who converts his property under an honest mistake, to render the resulting damage as light as it may be reasonably within its power to do. It is well said by Earl, J., in *Parsons* v. *Sutton*, 66 N.Y. 92, that 'the party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can. He must not by inattention, want of care or inexcusable negligence permit his damage to grow and then charge it all to the other party . . .'"

The plaintiff in *Wright* had fully paid for his shares, but through the broker's mistake, had not received the delivery

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* Kaufman's witness Walker testified as to the realistic availability of a short sale in August, 1969, and it was equally available in June (336a, Appendix, in Circuit Court).

thereof on demand. Kaufman bought and paid for hi shares when he entered into the contract in 1968, and al ready had a contractual right to at least the 13,170 shares even before Diversified's commitment letter of May 5, 1969 Thus the rule requiring Kaufman to mitigate his damages is plainly applicable to Kaufman and his now urging tha this was a case of conversion requires the application of the mitigation of damages principle that is an integral part o any such basis for damages. See also *Mayer* v. *Monzo*, 22 N.Y. 442, 446 (1917), and *Minor* v. *Beveridge*, 141 N.Y. 399 402 (1894). *Jones* v. *National Chautauqua County Bank* 74 N.Y.S. 2d 498, 505 (A.D., 4th, 1947), states that "the complainant must be vigilant to hold down or reduce his loss," when he charges wrongful deprivation of his shares

Kaufman should not recoup the loss in value between June 4 and August 1, 1969, when he knew he was to receive 13,170 fluctuating shares at least from May 14 onward (the date he received his copy of Diversified's letter of May 5 the contents of which were probably known to Kaufman on or about May 5). See timetable above. We submit that his reasonable time to sell ended with the three weeks be tween May 14 and June 4, because under Kaufman's theory of the contract expressed in his notice of breach, if the stock price was falling as it was ($36.93 to $33 between May 5 and June 4), there was no way he could not be claiming a right, by recomputation, to more shares, i.e., some sort of breach after May 5. The theory of the District Court awarding Kaufman damages herein for the delayed de- livery of 13,170 shares necessarily made him a "trader" in those shares able, presumably, to dispose of these shares as Diversified stock fell in value, and Petitioner is now strongly urging that the conversion rules apply herein. The essence of the erroneous District Court judgment was that Kaufman lost his chance to sell on or about June 4. But the law requires a trader to move promptly and Kauf- man had over three weeks before June 4 to sell up to 13,170 shares, either regular way (at the discount for "letter

stock") or by a short sale, and "fix his price on the descending market," thus escaping any money damages on the shares.* In *Gelb* v. *Zimet Brothers, Inc., supra,* the New York Court said:

> "In the instant case plaintiff learned of the wrongful sale of his stock on October 26, 1960 while he was in Hawaii. He returned to New York during the first week of November, 1960 . . . Although plaintiff conceded at the trial that he was financially able to purchase and pay for equivalent stock at the time of the conversion and at all times thereafter, he did not do so . . . the court is of the opinion that the reasonable time period applicable here expired prior to November 19, 1960. Plaintiff had ample time before that date to make arrangements to purchase the stock himself and to finance the transaction. To grant plaintiff a greater period of time would permit him to speculate on the future course of the market at defendant's expense . . ."

Kaufman too was an affluent and experienced businessman, who had already owned 8,015 Diversified shares (2,000 of which were were sold for cash shortly before the dispute arose) and 13,170 additional shares committed in writing ($700,000 in this single holding alone), and was well able to protect himself against losses by open market actions.

Kaufman's duty to sell has been restated forcefully under the latest decision on the subject in New York, *Tangorra* v. *Hagan Investing Corporation,* 327 N.Y.S. 2d 131 (A.D. 4th, 1971), where a brokerage customer placed an order to buy shares, the broker acquired the shares, and the broker then sent a written confirmation to the

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* Kaufman could cover any short sale without investing any money by delivering the Diversified certificates furnished on August 1. See testimony of his broker-witness Walker, 335a, Appendix in Circuit Court.

stockholder. The purchaser paid for the stock, but thereafter there were delays in the mailing of a stock certificate, because the stock certificates were in other names and had to be put through the transfer agent for the new certificates to be prepared. From December 19, 1969, when the customer's order was placed and the securities confirmed to her, until February 21, 1970, when the certificates were finally sent to the customer, two months elapsed, and during these two months the shares became valueless in the open market. The purchaser sued the broker to rescind the transfer, but did not allege that she tried to sell the shares that had been confirmed to her. The brokerage firm moved to dismiss the complaint, because the purchaser had failed to mitigate damages, and the losses sustained were the result of her own inaction. The 4th Department held that the complaint should have been dismissed on such grounds. The case is on all fours with the conduct of Mr. Kaufman in the instant situation, and the language of the New York Appellate Division, is as follows:

> "Defendants' motions to dismiss the plaintiff's complaint against them should have been granted. It has long been recognized that when a broker purchases stock on behalf of a customer, title to that stock immediately vests in the purchaser. (Baker v. Drake, 53 N.Y. 211; LeMarchant v. Moore, 150 N.Y. 209, 44 N.E. 770, and Uniform Commercial Code, § 8-313.) Thus, on the day plaintiff ordered the stock and Hagan purchased it for her, she became its owner. Since the plaintiff was the owner of the stock from the moment it was purchased by Hagan for her account, she had the power to sell it, even though she had not received delivery of the stock certificate (Broderick v. Alexander, 268 N.Y. 306, 197 N.E. 291). Any loss plaintiff sustained was the result of her own inaction. Consequently, having no basis for recovery, the defendants' motions should have been granted (Foley v. D'Agostino, 21 A.D. 2d 60, 248 N.Y.S. 2d 121)."

The principles underlying the above-cited case are clearly spelled out in Diversified's brief to the Circuit Court charging Kaufman with a duty to sell in the declining market. The distinction between legal ownership of shares and mere possession or lack thereof of the certificate for the shares is fundamental, and is recognized in many of the New York cases. *Parsons* v. *Lipe*, 286 N.Y.S. 60, 86, 91, *aff'd.* 269 N.Y. 630 (1936); *Burt* v. *Wilcox*, 22 N.Y. 551, 556 (1860); *Wills* v. *Investors Bankstocks Corp.*, 257 N.Y. 451, 460 (1931).

Mr. Kaufman contended below that Diversified changed its position on the nature of Mr. Kaufman's duty to mitigate damages during the period May 14, 1969 through August 1, 1969 when Diversified shares were steadily declining, as between its argument in the District Court and in the Circuit Court, on whether buying or selling was Kaufman's appropriate step to mitigating damages. Mr. Kaufman's own lack of definiteness as to what he really wanted (other than "something more"), created the difficulty as to what was the proper technique for mitigating damages during this crucial period, when the price of Diversified shares was steadily falling in the open market.

The contract required delivery of shares, and if we take Mr. Kaufman's written claim to more shares made on August 1, 1969, then his remedy was plainly to buy these shares in the open market at their reduced price and thereby cover his wish to have additional shares. But if we go to the commercial essence of his dispute, Mr. Kaufman wanted the money value of the undelivered shares, not the shares themselves, and made a claim for money damages when he filed his complaint in September 1969. Taking that as his real objective throughout, selling in the open market was his only remedy to minimize losses from the fall in value of the undelivered shares. Mr. Kaufman was precisely in the same position as the plaintiff in *Tangorra* v. *Hagan Investing Corporation, supra,* and so argued,

inferentially, when he called witness Walker, a broker, t testify as to how easily Mr. Kaufman could have fixed hi price on the Diversified shares in June, when the marke was higher, by a short sale. Diversified consistently urge the availability of short sale in its motion for new tria in the District Court, and to the Circuit Court.

The only response Mr. Kaufman made to his conceded ability to sell shares regular way, or sell them short, wa to state the difficulties of putting up margin, and the inter est charges to be incurred. Obviously, any interest charge incurred in mitigating damages would be an item of re coverable damage in a proper suit on a delayed deliver claim. As to the problems in putting up margin, Mr. Kauf man's own witness Walker was very affirmative on th ease with which Mr. Kaufman could borrow the stock t deliver against a short sale. Mr. Kaufman's substantia holdings of Diversified stock alone gave him the necessar borrowing strength.

Mr. Kaufman's contentions on this point further sough to preserve his speculative options between June 4, 196 and August 1, 1969, when the law clearly precludes retain ing such options. The whole idea of the duty to mitigat damages in the open market on a fluctuating commodity i that a claimant has a reasonable time to take appropriat market action to stop the damages from running, and afte that reasonable time has passed, any further damages ar incurred for his own account. The principles of *Gelb* v *Zimet Brothers, Inc., supra,* were not distinguished b Mr. Kaufman in his brief in the Circuit Court. Instead Mr. Kaufman stated it would be imposing a burden "o plaintiff to have given up the opportunity to share in an increase in the market value of the stock" (p. 28, Kauf man's brief to the Circuit Court). Mr. Kaufman is sti arguing the exact opposite of what the law provides i these circumstances.

(ii) *Application of the Uniform Commercial Code.* The District Court accepted the common law principle, but rested its decision which Petitioner seeks to reinstate on Section 2-712(3) of the Uniform Commercial Code ("U.C.C.") having allegedly superseded Kaufman's common law obligation to mitigate damages. *In re Carter's Claim, supra,* is directly contrary to the conclusion of the District Court. The Supreme Court of Pennsylvania therein held that Section 2 of the U.C.C. did not apply to an acquisition contract involving transfer of investment securities. The Court in Pennsylvania (which has had the U.C.C. for many years longer that New York) concluded that in Section 2-105(1) defining the word "goods", the U.C.C. expressly *excluded* transactions in investment securities from coverage of the whole section on sales. Section 2-105, U.C.C. may have invited use of the principles of Section 2 when it was "sensible" to apply them by analogy, but such analogy was not justified, held the Court, in a situation involving a remedy for breach of a corporate acquisition contract (similar to the one herein) involving purchase of investment securities. *In re Carter's Claim, supra,* states a principle which is equally sound under New York law, notwithstanding occasional New York decisions which apply Section 2, U.C.C. to securities when it was "sensible". See *Hunt Foods* v. *Doliner,* 270 N.Y.S. 2d 837 (A.D. 1st, 1966) and *Silverman* v. *Alcoa Plaza Associates,* 323 N.Y.S. 2d 39 (A.D. 1st, 1971). In the instant case, where the equitable behavior of two parties to a genuine dispute on contract interpretation is the central issue, analogy to the strict rules of a sale of goods situation, where principles of commercial certainty may sometimes be more important than fairness, is misplaced. The common law of contracts and its ancient principle requiring a plaintiff to minimize his losses is more "sensible" here than the law of sales. Significantly, Kaufman's counsel also urged in the District Court that Article 2 of the U.C.C. does not apply to the instant transaction involving investment securities. Thus,

the District Court's application of a portion of the U.C.C. to the mitigation of damages defense herein was misplaced, and the substantial common law authorities cited (and accepted by the District Court) continued to apply to Kaufman herein.

(iii) *The U.C.C. Did Not Overrule the Duty to Mitigate Damages Herein.* In concluding that Kaufman no longer had an obligation to "cover", the District Court relied upon U.C.C. 2-712 which gives the buyer the remedy of "covering" in the open market, and states that "failure . . . to effect cover . . . does not bar him from any other remedy". (2-712(3) U.C.C., McKinney's, 1964). (The other remedy is damages under U.C.C. 2-713, and as will be shown, that remedy still implies a duty to mitigate damages by methods other than cover.) U.C.C. 2-712 is further explained in the Official Comment, putting this case in another damage category—consequential damages under 2-715, by saying (p. 645, McKinney's, 1964):

> "Subsection (3) expresses the policy that cover is not a mandatory remedy for the buyer. The buyer is always free to choose between cover and damages for non-delivery under the next section [2-713].
>
> "However, this subsection [2-712] must be read in conjunction with the section [2-715] *which limits the recovery of consequential damages to such as could not have been obviated by cover.*" [emphasis supplied]

The damage remedy of U.C.C. 2-713 applies to an executory contract for sale of goods when non-delivery of the goods occurs. But this is not a case of failure to deliver goods, but rather, of failure to make a payment (in shares) owed on June 4. The goods were delivered a year before when Diversified acquired Datatron. The "goods" in this contract, although nominally an exchange of shares, were the assets of a business, and the Diversified shares were the

currency used to buy the business. The District Court took the case outside the pale of commercial reality by treating the payment as if it were the goods. The primary claim of breach was one of contract interpretation, failure to compute the shares payable on a correct basis—Diversified computed as of May 5, Kaufman as of August 1, and the District Court concluded (without appeal by Kaufman) that computation was required as of June 4. Diversified was not even chargeable with late delivery until Kaufman's contention of an August 1 breach date was rejected by the District Court in favor of a June 4 breach date. The fall in value after June 4 of the shares deliverable was a consequence one step removed from the primary breach in failing to compute correctly, and the damage remedy of U.C.C. 2-713 for non-delivery of goods is plainly inapplicable to damages herein for a fall in value of currency, the 13,170 shares concededly owed. Such damages should be considered "consequential" damages under the U.C.C. (i.e., special damages rather than general damages) because they are not "out-of-pocket" and are a purely theoretical consequence of the primary breach, failure to compute on the correct date.* The breach here is outside the ambit of a commonplace failure of a seller to deliver goods on time.

U.C.C. 2-712 "must be read in conjunction with" Section 2-715(2)(a), which limits consequential damages to "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know *and which could not reasonably be prevented by cover . . .*" Official Comment 2 (p. 699, McKinney's, 1964) states that a liberal rule of consequential damages is followed, but the liberality of that rule is modified by refusing to permit recovery unless the buyer has at-

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*At best they are lost paper profits on a contingent share transaction, described by the recipients in speculative terms as a "Come arrangement" (113a, Appendix in Circuit Court).

tempted to minimize his damages in good faith either by cover *or otherwise.* Moreover the concept of mitigating damages remains very much a part of all sections of the U.C.C., and "a better appreciation . . . may be obtained if the starting point is placed in the general principles of the law of damages antedating the Code, rather than in the express provision of the Code." *2 Anderson on the U.C.C.*, p. 473. *Parsons* v. *Sutton, supra*, and its progeny has therefore *not* been overruled by the U.C.C., and Kaufman on his claim for consequential damages was clearly required to sell his 13,170 fluctuating shares of stock or otherwise mitigate his loss. See *Magnavox Co.* v. *Royson Engineering Co.*, 169 A. 2d 559 (Pa. Super., 1961) interpreting the U.C.C. and holding that a buyer cannot recover from a seller for consequences that reasonably could have been avoided by the buyer. Setting aside "cover" as a requirement, damages for primary breach as granted below, even under U.C.C. 2-713 still required reasonable exertions, other than "cover", to avoid compounding a loss. As shown, Kaufman knew from May 14, 1969 onward that he was to receive 13,170 shares valued at $36.93 per share, that the market was declining (reaching $33 by June 4) and that Kaufman was going to demand more shares or money damages under his theory of the contract. His subsequent loss between June 4 and August 1, when the stock reached $21.63 per share was not a loss cognizable by the law of damages, because it was easily and reasonably preventable in the open market for at least three weeks prior to this period.

Kaufman's own briefs and testimony on damages to the District Court, on the issue of the percentage discount for unregistered shares, in effect, conceded his ability to prevent the loss on the 13,170 shares. Kaufman there argued forcefully that he could have sold his unregistered shares short in the declining market, at full market value, borrowing certificates from his broker (Kaufman's witness

Walker) to deliver to the purchaser in the short sale. He urged that he could have limited his losses for the future, and incidentally registered a substantial speculative profit, with no obligation to deliver his own share certificates to cover the short position until two years later when the shares became deliverable as "free" stock under the Securities Act of 1933. With an inventory of 6,015 Diversified shares still in hand by Kaufman (2,000 had been sold for cash in April, 1969), a written promise from Diversified of 13,170 more, and a conceded ability to sell short with borrowed shares, minimizing losses on a money damage claim was a simple matter for Kaufman. A short sale was nothing more than a matter of financing with his broker or another lender. If Kaufman chose to cover his short sale within a few weeks by an open market purchase of $21 shares, he would then refuse the certificates delivered late by Diversified and demand their money value on August 1 —$21 per share to replace his expense of covering. In this case where the market was steadily declining, Kaufman could have ended the speculation by selling short without possessing share certificates. *Parsons* v. *Sutton, supra,* and *Hamilton* v. *McPherson, supra,* do not require only purchases; they require any "reasonable exertions to render the injury as light as possible."

Moreover, Kaufman could have avoided the damages merely by making a claim to Diversified, instead of lying-in-wait until August 1. If he had undertaken the "reasonable exertion" of merely speaking up, then Diversified could have taken steps to reduce the damages, by immediate delivery of the certificates for 13,170 shares concededly due (because its other commitments were modifiable), or by open market purchases by Diversified to hedge against further market fluctuation (see Ross testimony, 218a, Appendix in Circuit Court). Kaufman had the means to minimize damages merely by giving some notice of his position in June or early July, instead of waiting until he had certificates in hand to send his registered letter. He

willfully and unnecessarily allowed damages to be
creased, and while that may not be a complete defense
liability on all 14,739 shares, it was a bar to any dama
on the 13,170 shares he knew he had coming to him. *Fiore*
v. *Miller*, 183 N.Y.S. 2d 772, 775 (N. Y. County, 1959)
holds, and applies the further doctrine from *Rothschild*
Title Guarantee and Trust Co., 204 N.Y. 458, 464 (191
that no action whatsoever amounts to equitable estop
with respect to fluctuating shares.

C. ***Kaufman Failed To Give Adequate Notice Of T***
Breach Now Claimed. The final reason why the Distr
Court had to be reversed lies in settled doctrine on wh
constitutes adequate notice of breach, where the law of N
York and the Circuits is alike. The District Court held th
Kaufman's notification of insufficient performance on A
gust 1, 1969, the same day he accepted delivery of 13,1
shares, was adequate notice of breach to justify the $75,0
damages awarded for seven weeks' late delivery. The D
trict Court's conclusion was that U.C.C. 2-607 requires
buyer to notify a seller of breach "after the buyer has
cepted delivery of" the goods, and since no stock was deli
ered on the due date, Kaufman had no duty to notify un
August 1, 1969. The notice given on August 1 was n
itself adequate under the common law rule or the U.C.
embodiment thereof. This issue was not reached by t
Circuit Court because of its reversal on failure to sh
intent to resell, but it is a serious legal obstacle to Kau
man's recovery, and additional reason for concluding su
stantial justice was done by the Circuit Court's decisio

At the outset, the principle of *In re Carter's Clai*
supra, that U.C.C. Section 2, the Law of Sales, does n
apply to transactions such as this in investment securiti
was a complete answer to the conclusions of the Distri
Court. The common law of New York governs on th
point, not the U.C.C. At best, the U.C.C. can provi

only a possible analogy. But as will be shown, the common law and the U.C.C. call for the same legal conclusion on this point, to wit, Kaufman failed to give adequate notice of the breach of contract upon which the judgment he seeks to reinstate was rendered.

U.C.C., Section 2-607(3)(a) requires that the buyer "notify the seller of breach or be barred from any remedy." The breach that Kaufman gave notification of was *not* seven weeks' late delivery, but, rather, a failure to compute the number of shares as of the 20 days preceding August 1, 1969. First Kaufman signed a document acknowledging receipt of the shares "as per agreement." Then his notice of breach sent on the same day by registered mail, presumably to indicate its formal legal effect, said ". . . it is my understanding that the per share value was to be computed on an average price per share 20 days preceding issuance of the shares . . . I believe Diversified . . . is in error." This is the only breach Kaufman ever claimed in his notice, in his pleadings, or throughout the trial.

That claim of breach was based on an artificial construction of the contract which the District Court and the Circuit Court *both* ruled against, holding that computation of shares was not open-end until actual physical delivery of certificates, but that computation must occur within the 30 day period of promised delivery, held to have ended on June 4, 1969. Thus the District Court ruled (with no issue on the appeal) that the breach as to which Kaufman notified Diversified was not a breach at all. The Circuit Court expressly concurred on this legal issue (Pet. App. A, 7a). Kaufman never expressly made a claim arising from seven weeks' late delivery. It is well settled in New York and Pennsylvania, where the U.C.C. was first enacted, that the claim of breach under Section 2-607(3)(a) must be stated with reasonable particularity. See *Kelly* v. *Nick*, 38 Pa. Erie 61, 65 (1954). For New York antecedents to this

section of the U.C.C., see *Atwater & Co.* v. *Panama R. Co.*, 255 N.Y. 496, 503 (1931), where Justice Lehman said,

> "The buyer, both by what it said and by what it left unsaid, impliedly offered to receive belated delivery as satisfaction of the seller's obligation. Perhaps it might otherwise have refused. The defendant having asked and accepted delivery of the deficit in past due installments upon such an implied agreement, may not thereafter recover for breach of a promise to deliver earlier."

Another common law antecedent is *Hess* v. *Kaufherr*, 112 N.Y.S. 832, 833 (A.D. 1st, 1908), holding that a claim of breach must rest on specific grounds, and if delay in delivery is not asserted as a ground, it is not a basis for later asserting damages. In *Hess*, the buyer notified of a breach in merchantable quality of the goods only, and later tried to obtain damages for delayed delivery, but the Appellate Division properly excluded such element of damage. Accord: *Robinson Clay Products Co.* v. *Thatcher*, 150 N.Y.S. 658 (A.D. 1st, 1914); *J. F. Pennell* v. *New Jersey Brass Corporation*, 186 N.Y.S. 606 (A.D. 1st, 1921); *Belmet Products* v. *Merit Enterprises, Inc.*, 236 N.Y.S. 2d 254 (Civ. Ct. Kings, 1963); *Bangor Clothing Co.* v. *Superior Sportswear Corp.*, 254 N.Y.S. 2d 415 (A.D. 1st, 1964).

In the Southern District of New York, Judge Rifkind dealt with this specific issue in *In re Gotham Silver Co.*, 91 F. Supp. 520, 524 (S.D.N.Y., 1950) and held that notice of breach claiming delivery of wrong merchandise, cannot be used as a basis for recovery of damages for delayed delivery. We submit that notice of a breach claiming a wrong calculation under the contract, cannot be used as a basis for recovery of damages for delayed delivery. Judge Learned Hand dealt with the same issue in *American Mfg. Co.* v. *U. S. Shipping Board*, 7 F. 2d 565, 566 (2d Cir.,

1925), saying:

> "the larger part of the damages claimed was for the delay in delivery . . . Delay in delivery, of course, is a breach, and the plaintiff was obliged to give notice within a reasonable time after October 20, 1920 [late delivery date]. It did nothing till February 19, 1921, and four months is more than a reasonable time . . .
>
> ". . . The notice 'of the breach' required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning." [emphasis supplied]

What early warning did Diversified ever have of Kaufman's claim that seven weeks' delay in delivering 13,170 shares would justify $75,000 damages? The District Court was the first participant in the then two year old controversy to articulate the delayed delivery claim, and it was far too late for Kaufman to invoke it under the U.C.C. and its well-recognized common law antecedents.

Mr. Kaufman's citation of *Richard* v. *American Union Bank, supra,* in the Circuit Court and herein did not support his position on the delayed delivery point. Judge Lehman there stated, in evaluating a complaint alone, that a buyer of a commodity may accept delivery of the commodity after the stipulated date and may still retain his right of action for damages caused by delayed delivery. However, other cases make it clear that a claim for damages for delayed delivery must be the subject of prompt and adequate notice to the person who is late in making the delivery. The difficulty in Mr. Kaufman's whole position is that he never made a claim for late delivery, until

he had a judgment he wished to sustain in the Circuit Court. Instead, he sent a letter in August, 1969 arguing a specious theory of contract interpretation which left computation of the number of shares open indefinitely and logically precluded any claim for late delivery, on the theory that whenever delivery was made, a recomputation was required as of that date. *American Mfg. Co.* v. *U. S. Shipping Board, supra,* required Mr. Kaufman to give notice of a claim for delayed delivery, as to which the law required early warning. His notice on August 1, 1969 was not only deficient but it logically foreclosed any claim of breach for late delivery—the notice by its express terms negated the claim now made.

The notice made the statement "it is my understanding that the per shares value was to be computed on an average price per share twenty days preceding issuance of the shares . . . I believe Diversified Metals Corporation is in error." That statement of a continuing claim for faulty computation precludes a claim for late delivery. In Mr. Kaufman's brief in the Circuit Court, he argued that the notice omitted a specific description of what the "error" was, to justify his contention that he felt Diversified breached the contract, and that his notice conveyed that general thought. But the specific words of the notification modify the general word "error," and specific words set forth a claim of faulty computation intentionally and carefully made. This claim of faulty computation was reiterated in a complaint prepared by his lawyers setting forth the theory with precision, and followed by a lengthy proof on such theory. To convert such written claim two years later at trial into a claim for late delivery would be contrary to the principles of early warning stated by Judge Hand in *American Mfg. Co.* v. *U. S. Shipping Board, supra.*

Kaufman argued below that notice of the breach as explained by the Official Comment to Sec. 2-607, "need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched," a clear statement

of all the objections that will be relied on by the buyer is not required and the notification "need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation." Thus argued Kaufman from such Comment, his notice that the contract required a different method of computation, is as good as a notice that he was suffering market damages by delayed delivery of his shares. But as *2 Anderson on the U.C.C.* p. 220 states, "it is likely that the courts will interpret the code's provision more strictly than above indicated by the [quoted] Official Comment." This broad comment cannot undo decades of specific judicial interpretation on the requirement of a specific reservation of rights to sue for delay.

We submit that even under the broad language of the Official Comment quoted, Kaufman's notice of a claim of breach was woefully inadequate. *2 Anderson on the U.C.C.* p. 209 states plainly that "where the goods are delayed in reaching the buyer, the latter waives his right to claim damages for breach of contract by way of delay when he accepts the goods without a reservation of rights [as to delay] or fails to give notice of breach [for delay] thereafter." (Insertions supplied) It was just this sort of unsupported claim, used as a peg to draw in other claims later, that the rule of the common law and the U.C.C. was designed to prevent. Thus, the conclusion in the District Court on the adequacy of notice was also in error, and such error was a separate and unimpeachable ground for the Circuit Court's reversal on damages (petition for rehearing and rehearing *en banc* denied), which was not reached because of the other ground stated.

Conclusion

The reasonableness of the parties' behavior in the circumstances shown was the central issue on the appeal and underlay the conclusions of the Circuit Court. While settled

principles of the law of damages were applied, it was the nuances in the facts that pre-determined the outcome herein. From receipt of the May 5 commitment letter on May 14, 1969 and thereafter, Kaufman *knew* he had 13,170 shares committed to him in writing by Diversified. Whether one invokes the metaphysics of legal title under the U.C.C., or equitable title by contract or treats the May 5 letter as merely an irrevocable promise of partial performance, Mr. Kaufman had these shares effectively "locked up" and was speculating on their value to see if he could get more shares, waiting until August 1 when he had "the stock in hand" to advance a specious theory of contract interpretation to support his market play. The timetable shows behavior instinct with secretiveness and an attempt to preserve his options until be obtained the first block of shares promised to him. The confusion of the relevant theories in the District Court in the jury trial was a direct result of an artificial cause of action for $230,000, when at best his out-of-pocket damages for deprivation of 1,569 shares were barely 10% of the claim. Afterthought and overreaching were the dominant themes in his case.

This case was wrongly tried initially, and on the documents alone, Diversified believed Kaufman was not entitled to recover anything on his claim because equitable delivery accomplished full performance. But the Circuit Court decided that issue adversely to Diversified, and reversed only on the magnitude of damages for several sound reasons, none of which vary among the Circuits or the states. Mr. Kaufman did not lose his case because of new law, but because he behaved badly, as measured by established doctrines of the law merchant. This was essentially a factual case; Kaufman reached too far and shifted his ground too often, and his citing all the damage cases where courts did not consider the specific details of the parties' post-controversy behavior, cannot make his conduct equitable. To have awarded any more than $25,888.50 would have been to grant damages for a fall in paper value of

ommitted shares, and would have been an unconscionable eward to what was never anything more than a speculative nterprise. The Petition should be denied.

Respectfully submitted,

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ctober 16, 1972

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of Counsel.